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SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

October Term, 1967.

No. 528

MARION J. BERGUIDO, Individually, MARION J. BERGUIDO, ROBERT G. ROWE and WARREN H. WOODRING, Executors of the Estate of CARLOS BERGUIDO, JR., and JUNE BERGUIDO, JOY BERGUIDO, JILL BERGUIDO and CARLOS BERGUIDO, 3rd, by Their Guardian, MARION J. BERGUIDO,

Petitioners,

v.

EASTERN AIRLINES, INCORPORATED,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. .

MARION J. BERGUIDO, INDIVIDUALLY, MARION J. BERGUIDO, ROBERT G. ROWE AND WARREN H. WOODRING, EXECUTORS OF THE ESTATE OF CARLOS BERGUIDO, JR., AND JUNE BERGUIDO, JOY BERGUIDO, JILL BERGUIDO AND CARLOS BERGUIDO, 3RD, BY THEIR GUARDIAN, MARION J. BERGUIDO,

Petitioners,

v.

EASTERN AIRLINES, INCORPORATED,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Marion J. Berguido, individually, Marion J. Berguido, Robert G. Rowe and Warren H. Woodring, Executors of the Estate of Carlos Berguido, Jr. and June Berguido, Joy Berguido, Jill Berguido and Carlos Berguido, 3rd by their Guardian, Marion J. Berguido, by their attorneys, Richter, Lord, Cavanaugh, McCarty & Raynes, respectfully petition that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on June 9, 1967.

OPINIONS BELOW.

The original opinion of the Court of Appeals in this case is reported at 317 F. 2d 628. The opinion of the Court of Appeals denying plaintiff's timely petition for rehearing from the original appeal is reported at 317 F. 2d 633. Circuit Judges Kalodner and Hastie dissented from the denial of said petition and Judge Kalodner filed his own dissenting opinion.

The opinion in this case is reported at 369 F. 2d 874 and the opinion on the petition for rehearing, decided June 9, 1967 is attached as Appendix C to this petition. This contains a one line per curiam affirmance and a dissent by Kalodner, J. and Staley, C. J. which discusses the issues.

JURISDICTION.

The judgment of the United States Court of Appeals in the Third Circuit was entered on 23 day of November, 1966. Plaintiff's petition for rehearing in said Court was timely filed. Said petition was denied by an order of the court entered June 9, 1967 with Judges Kalodner and Chief Judge Staley dissenting. The jurisdiction of this Court is invoked under c. 646, Act of June 25, 1948, 62 Stat. 928, 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Does the failure of an airline to print in adequately informative, clear, proper, legible form its claim for limitations of damages following a crash in international flight as required by Chapter II, Article 3(1) of the Convention leave the carrier subject to the absolute liability imposed upon it by Chapter III, Article 17?

2. Where the carrier has failed to comply with Chapter II, Article 3(1) of the Convention as to the form and contents of the ticket or proper delivery of the same, does not the absolute liability imposed by Chapter III, Article 17 on the carrier remain in effect and are not the issues of negligence or wilful misconduct irrelevant as unreached?

3. Was not the ticket in the instant case in violation of the requirements of Chapter II, Article 3(1) of the Convention because of its miniscule illegible print and its failure to state the claimed monetary limitation of damages as well as to expressly note Jacksonville as one of the agreed stopping places?

4. Was not the finding of fact that jets were the cause of the crash "clearly erroneous" and untenable where it was based exclusively on proof by deposition and such evidence was vague, self contradictory and overwhelmingly disproved by official government records and the testimony of a host of impartial witnesses?

5. If this court decides that in this international flight crash the carrier is not entitled to the limitations of damages of Articles 20, 21 and 22 because it issued inadequate and defective tickets, should not this Court enter judgment for petitioner in the sum of $375,000 plus interest and costs where the trial judge without exception thereto found petitioner suffered damages in that amount?

THE STATUTES INVOLVED.

The Warsaw Convention, 49 Stat. 3000, provides as follows:

CHAPTER II

TRANSPORTATION DOCUMENTS

Section I—Passenger Ticket

Article 3

(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

(a) The place and date of issue;

(b) The place of departure and of destination;

(c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;

(d) The name and address of the carrier or carriers;

(e) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

Section II—Baggage Check

Article 4

(1) For the transportation of baggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a baggage check.

(2) The baggage check shall be made out in duplicate, one part for the passenger and the other part for the carrier.

(3) The baggage check shall contain the following particulars:

(a) The place and date of issue;

(b) The place of departure and of destination;

(c) The name and address of the carrier or carriers;

(d) The number of the passenger ticket;

(e) A statement that delivery of the baggage will be made to the bearer of the baggage check;

(f) The number and weight of the packages;

(g) The amount of the value declared in accordance with article 22(2);

(h) A statement that the transportation is subject to the rules relating to liability established by this convention.

(4) The absence, irregularity, or loss of the baggage check shall not affect the existence or the validity of the contract of transportation which shall nonetheless be subject to the rules of this convention. Nevertheless, if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at (d), (f), and (h) above, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability.

Section III—Air Waybill

CHAPTER III

Liability of the Carrier

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 20

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

Article 21

If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

Article 22

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law

of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sum mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

Article 25

(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

STATEMENT OF THE CASE.

Carlos Berguido, Jr. was killed in the crash of an Eastern Airlines plane on December 21, 1955 in the vicinity of Imeson Airport, Jacksonville, Florida. We are now almost twelve years from that accident. The facts of the accident and the rulings of the trial judge of importance here are related at p. 34 et seq., *infra*. Of special importance is the admission by the carrier that it could not prove as required by Article 20, *supra*, at p. 6 that it had taken all necessary measures to avoid the damage or that it was impossible for it to do so. Trial Record (118a). We have seen in the wake of its wreckage, two mistrials, a jury verdict for the widow and children in the amount of $454,658; a reversal by the Court of Appeals for the Third Circuit on an evidentiary point remanding for a new trial; a petition for certiorari to the Supreme Court of the United States by present petitioner denied; a jury finding of no wilful misconduct; a reversal by the trial judge of the jury's verdict of no wilful misconduct; a petition for mandamus by present respondent to the Court of Appeals C. A. 3 denied; and most recently a judgment for the defendant by a trial judge sitting without a jury. There was then an affirmance by the Court of Appeals by a two-to-one vote and finally a denial of a Petition for Rehearing with two judges dissenting and writing an opinion where no opinion is written for the majority on the Petition for Rehearing, but merely a statement that the Petition for Rehearing is denied. This petition followed.

REASONS URGED FOR GRANTING THE WRIT.

I. The Scheme of the Warsaw Convention Is Absolute Liability Upon the Occurrence of a Crash, Damages for Which Are Subject to the Limitations Expressed in Articles 20, 21 and 22 if the Ticket Meets the Requirements of Chapter II, Article 3, § (1) and Is Properly Delivered.

The majority opinion 369 F. 2d 874 holds that even if the carrier violated Article 3(1) that:

> ". . . . Success of the latter argument would have removed the Convention defense of limited liability and allowed the suit to proceed to trial, *with the plaintiff's burden being merely to prove the negligence of the defendant, rather than wilful misconduct,* this approach being the appropriate substitute for appellant's urged absolute and unlimited liability without fault theory". (Emphasis supplied.)

With this view of the scheme of the Warsaw Convention petitioner violently disagrees. She disagrees that the appellant's position as to Article 3(1) is, that if it was violated she still could recover only if she also proved carrier negligence. Under no reading of the Convention nor the *ratio decidendi* of any case is negligence the basis of recovery in *international* air crash cases. The appellant's position has consistently been that she wins on proof of failure by the carrier to comply with Article 3(1) and that she need prove neither negligence nor wilful misconduct.[1] Only if this court holds that the ticket in fact complies with

1. Once the airline fails to comply with Article 3(1) the issue of negligence should never have been reached and certainly this case could not turn on it as the majority opinion rules. It is totally irrelevant. Indeed if the case were so charged to the jury it would be reversible error as it was held to be in cases under the Safety Appliance Laws of the United States, 45 U. S. C. A. 11 where, too, negligence is not a requirement to a recovery thereunder. In the case of *Long v. Union R. R. Co.*, 175 F. 2d 199 (C. A. 3, 1949) the 3rd Circuit so held. *Zumwalt v. Gardner*, 160 F. 2d 298, 304 (C. A. 8, 1947) and *O'Donnell v. Elgin J & E Ry Co.*, 70 S. Ct. 200 (1949) are in accord.

Article 3(1) does petitioner then need to prove wilful misconduct.

All of the discussion of the factual findings of the trial judge re negligence and wilful misconduct, *supra*, pales into meaninglessness for the majority opinion in this case demonstrates a complete failure to recognize that negligence vel non is a completely irrelevant consideration in this case in the posture in which it was as of the time of its submission to the trial judge for adjudication. For this is a case under the Warsaw Convention. And the carrier's ticket did not comply with Chapter II, Article 3(1). Petitioner therefore completely disagrees with the statement in the opinion by the majority that if the carrier failed to comply with Article 3(1) of the Convention that the plaintiff would still have *"the burden to prove the negligence of the defendant rather than wilful misconduct, this approach being the appropriate substitute for appellant's urged absolute and unlimited liability without fault theory"*. 369 F. 2d 879 (Emphasis supplied).

II. A Passenger Need Not Prove Negligence or Wilful Misconduct Once He Has Established a Faulty Ticket Because the Carrier Violated Chapter II, Article 3, § (1).

The Court of Appeals' conclusion that "an analysis of the question [of the extent of the carrier's liability on the Warsaw] does not support absolute unlimited liability as the scheme of the Convention" is in direct conflict with the opinion of this same court in this same case in the first opinion when the three judges held:

> ". . . the Warsaw Convention provides, inter alia, that the carrier is *absolutely liable* for all injuries where the accident causing the damage so sustained takes place on board the aircraft." 317 F. 2d 629. (Emphasis supplied.)

The opinion of the Court of Appeals in this case is in direct conflict with the Court of Appeals for the 2nd Circuit, which held:

". . . the scheme of the Warsaw Convention is pretty plain on its face. Chapter III is the one which concerns us here. *Article 17 imposes an absolute liability upon the carrier for all personal injuries regardless of fault . . .*" Per Medina, J. in *Grey v. The American Airlines,* 227 F. 2d 282, 285 (C. A. 2, 1955) cert. denied 350 U. S. 989 (1956). (Emphasis supplied.)

It is also in conflict with the Court of Appeals for the Ninth Circuit, which takes the same view of the Convention's scheme. *Warren v. The Flying Tiger, Inc.,* 352 F. 2d 494 (C. A. 9, 1965). See also *Klar v. H & M Parcel Room, Inc.,* 270 App. Div. 538, 61 N. Y. S. 2d 285 aff'd 296 N. Y. 1044.

The Court of Appeals decision in this case is also in conflict with *Westminister Bank v. Imp. Airways, Ltd.,* 2 All. E. R. 890 (K. B. 1936). That case also holds that there is absolute unlimited liability in a Warsaw case when the provisions of the Warsaw Convention relating to the providing of an adequate ticket are not met.

III. The Decision in the Instant Case Is in Conflict With Cases Decided in the Second and Ninth Circuits and the English Courts.

The opinion and conclusion of the Court in the instant case, when it decides that the plaintiff must still prove negligence even though an inadequate ticket not in compliance with the requirements of the Convention has been delivered, is in conflict with the opinion of the Court of Appeals for the Second Circuit in *Mertens v. The Flying Tiger Line, Inc.,* 341 F. 2d 851 (1965). In that case a unanimous court, per Marshal, J. decided that the carrier could not avail itself of the limitation of liability because there was an inadequate delivery of the ticket and held that the case would be sent back merely for a trial only on the issue of damages. Thus that Court decided that the absolute liability of the defendant had been established by the same

kind of ticket as confronted the trial judge here. The cases are therefore in stark conflict.

Since the Court of Appeals below failed to give effect to the inadequacy of the ticket and made available to the defendant the liability limitations of the Convention (Article 25), the decision in this case is directly contrary to the decision of the Court of Appeals for the 2nd Circuit in *Lisi v. Alitalia-Linee Aeree Italiane,* 370 F. 2d 508 (1966).

The case of *Alitalia-Linee Aeree Italiane v. Lisi* is now pending in this court as Docket No. 1169. The decision in the Court of Appeals (Second) in that case is in direct conflict with the disposition by the Court of Appeals (Third) on the very same issue presented in this case. For in *Lisi, supra,* the holding was that the carrier was *not* permitted to take advantage of the liability limitations of the Convention where it failed to deliver to a passenger a legible ticket that properly advised the passenger of the limitations. In this case, the disposition is that the carrier *was* allowed to take advantage of the limitations despite the fact that it delivered a woefully inadequate ticket much less legible and less informative than the *Lisi* ticket.

The dissenting opinion by Judge Kalodner on the Petition for Rehearing in the instant case joined in by Chief Judge Staley forceably points out this very conflict and concludes "the disposition made by this court at 369 F. 2d 874 in the instant case, is in conflict with that made by the 2nd Circuit [*Lisi*] and for that reason alone requires the granting of the Petition for Rehearing". The conclusion of this sentence may be paraphrased by saying that that reason alone requires the granting of the Petition for Certiorari. In accord *U. S. v. Minker,* 350 U. S. 179, 180 (1956).

The identical questions raised in this petition are now being raised by the carrier before the Supreme Court of the United States in the case of *Alitalia-Linee Aeree Italiane v. Lisi, supra.* That case was brought by the airline to the Supreme Court on an appeal from the decision of the Court of Appeals for the 2nd Circuit which appears

at 370 F. 2d (1966). In *Lisi* on pre-trial motion the ruling was as a matter of law that the carrier would not be permitted to take advantage of the liability limitations of the Warsaw Convention ($8300) because it had failed to deliver to the passenger a ticket that properly advised the passenger of such limitations sometimes available under Chapter III, Article 22(1) of that treaty, noted under the heading "Liability of the Carrier" because it had failed to comply with the requirements set forth under Chapter II, headed "Transportation Documents" which in Article 3(1) necessitate that a passenger ticket must contain certain specific data which the ticket involved in the *Lisi* case did not contain.[2] Nor did it till 1964 put in use on its counters placards, similar to App. A, p. 51, *infra*. In the instant case the ticket is even more violative than *Lisi* of the requirements of Chapter II, Article 3(1) "For the Transportation of Passengers the Carrier must deliver a Passenger Ticket which shall contain the following particulars". In addition to the violations noted in the *Lisi* case because of which the ticket was held inadequate in that it was virtually illegible

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2. Chapter II—Transportation Documents
Section I—Passenger Ticket—Article 3
(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:
(a) The place and date of issue;
(b) The place of departure and of destination;
(c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;
(d) The name and address of the carrier or carriers;
(e) A statement that the transportation is subject to the rules relating to liability established by this convention.
(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

as well as uninformative of the nature of the proposed money limitation, the ticket here in *Berguido* failed to mention Jacksonville, the city where the plane was attempting to make a normal landing when it crashed, as one of the "agreed stopping places." This latter violation is of serious import because it substantially and proportionately increases the risk so greatly to the passenger. For it is a well recognized fact that most air crashes occur while a plane is taking off or landing and in this case the crash occurred while attempting to land on the runway. By making Jacksonville an additional stopping place, to which by contract the plaintiff's decedent had *not* agreed, the airline unilaterally increased the risk of harm to him by 33⅓% because the ticket only mentioned two stops on its way from Miami (Washington-Philadelphia) though indeed a third at Jacksonville was being made to which the plaintiff's decedent had not agreed nor been informed of and during which attempt the plane crashed. There was no proof that this was an emergency landing.

As stated, the form, context, size of print and the obscurity and difficulty in reading of the *Lisi* ticket and the instant Berguido ticket are identical with the exception of the fact that in the instant ticket, one of the stopping places (Jacksonville) was not mentioned. This ticket is even less informative.[3] If anything, the instant ticket contained even less about Warsaw's effect in the event of the passenger's death than the *Lisi* ticket did. The *Lisi* ticket at least warned the passenger, that ". . . in most cases—the Convention limits the liability of carriers for death or personal injury. . . ." 253 F. Supp. 242. Not even that legally inadequate warning was on the instant ticket.

We quote in full the *Lisi* opinion, 370 F. 2d 508 of the Court of Appeals through Kaufman, J. At page 511 et seq., it reads:

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3. See facsimile of instant tickets in Appendix B herewith attached. The Lisi tickets are set forth in the appendix to its District Court opinion at 253 F. S. 242.

"It is clear, however, that under other Articles of the Convention, these limitations on liability are not applicable if the carrier fails to deliver to the passenger a ticket or a check for baggage. These Articles, moreover, provide that the ticket and check shall contain certain specified information, including 'a statement that the transportation is subject to the rules relating to liability established by this convention.' *Thus, it would appear, that unless the carrier furnishes to the passenger a ticket or baggage check containing the appropriate statement, it may not restrict its liability as circumscribed by the Convention Articles.*

Alitalia responds, however, by arguing that there is a crucial difference in the language between Articles 3 and 4. While Article 4(4), it says, denies the carrier limited liability 'if * * * [it] accepts baggage without a baggage check having been delivered, *or if the baggage check does not contain the particulars*' (Emphasis theirs) the only ground stated in Article 3(2) for denying limited liability for the personal injuries or death of passengers, is the carrier's failure to deliver a ticket. Thus, we are asked to apply the principle *expressio unius est exclusio alterius* and to hold that failure to give notice on the passenger ticket that the flight is subject to the Convention's rules, will not deprive the carrier of the substantial delimitation of liability for personal injuries or death. All that is required, urges Alitalia, for this right to vest, is that a ticket be delivered to the passengers.

II.

It is apparent that Alitalia relies on a literal reading of the Convention for its assertions. We reject the interpretation it urges upon us. While it is true that the language of the Convention is relevant to our decision, it must not become, as Justice Frankfurter stated it, a 'verbal prison.' *Sullivan v. Behimer*, 363 U.S. 335, 358, 80 S. Ct. 1084, 4 L. Ed. 2d 1254 (1960)

(Frankfurter, J., dissenting). The task of ascertaining the meaning of words is difficult, and one certain way of misinterpreting them is by a literal reading. As Learned Hand put it, 'words are such temperamental beings that the surest way to lose their essence is to take them at their face.' 1942 Address by Judge Hand to the Massachusetts Bar Association. Thus, the language of Article 3 cannot be considered in isolation; rather, it must be viewed in light of the other Articles and the overall purposes of the Convention. See *Eck v. United Arab Airlines, supra.*

This is not the first occasion on which we have been called upon to interpret the language of the Convention's delimiting provisions. For example, in *Mertens v. Flying Tiger Line, Inc.*, 341 F. 2d 851 (2d Cir.), cert. denied, 382 U. S. 816, 86 S. Ct. 38, 15 L. Ed. 2d 64 (1965), we were asked to decide whether presenting a ticket to a passenger after he boarded the carrier's plane, constituted a 'delivery' within the meaning of Article 3(2). We stated:

We read Article 3(2) to require that the *ticket be delivered to the passenger in such a manner as to afford him a reasonable opportunity to take measures to protect himself against the limitation of liability.* Such self-protective measures, could consist of, for example, deciding not to take the flight, entering in a special contract with the carrier, or taking out additional insurance for the flight. The Convention specifically provides that 'the carrier and the passenger may agree to a higher limit of liability' (Article 22(1)) and there would be little reason to make this provision, to require that the ticket state that the liability of the carrier is limited (Article 3(1)(e)), and to require that such a ticket be delivered to the passenger unless the Convention also required that the ticket *be delivered in such circumstances as to afford the passenger a reasonable opportunity to take these self-protective measures.'* Id. at 856-857 (Emphasis added.)

We held, accordingly, that the delivery was inadequate, and the Convention's fixed limits of liability were not available.

Later, a similar result was reached by the Ninth Circuit in *Warren v. Flying Tiger Line, Inc.*, 352 F. 2d 494 (1965). There the passenger was given a 'boarding ticket' or 'pass' at the foot of the ramp leading to the aircraft. The Court decided that the 'delivery' must be made sufficiently in advance so that the passenger will have the opportunity to take self-protective measures, such as purchasing additional insurance if he so chooses. The 'delivery' of a boarding ticket at the foot of the ramp as the plane was about to depart, did not suffice therefor. The carrier, accordingly, was barred by Article 3(2) from availing itself of the Convention's liability limitation provisions.

We believe that the reasoning of the Mertens and Warren decisions is apposite to the case now before us. The Convention's arbitrary limitations on liability—which have been severely and repeatedly criticized—are advantageous to the carrier. **But the quid pro quo for this one-sided advantage is delivery to the passenger of a ticket and baggage check which give him notice that on the air trip he is about to take, the amount of recovery to him or his family in the event of a crash, is limited very substantially.** Thus the passenger is given the opportunity to purchase additional flight insurance or to take other steps for his self-protection as he sees fit. (Double emphasis ours.)

This notice to passengers is especially important in this country where the overwhelming number of people who travel by air do so on domestic flights, for which the Convention's restrictions on liability are inapplicable. It is too much to expect these passengers to be sufficiently sophisticated to realize that although they are traveling the same number of miles on an international flight that they have fre-

quent traveled domestically, the amount they may recover in the event of an accident is drastically reduced. In short, it is clear from the *ratio decidendi* of the Mertens and Warren cases, that the inquiry that must be made if the Convention's Articles are to be given meaning, is '[w]hether the ticket was delivered to the passenger in such a manner as to afford him a reasonable opportunity to take self-protective measures * * *'. *Mertens v. Flying Tiger Line, Inc., supra,* 341 F. 2d at 857.

III.

We proceed to determine, therefore, whether the particular tickets and baggage checks involved in the present case gave the appellees adequate notice. On the front of the ticket and baggage check, in exceedingly small print, was the following message: 'Each passenger should carefully examine this ticket, particularly the Conditions on page 4.' And, at this point, we note that one of our reasons in *Mertens v. Flying Tiger Line, Inc., supra,* for precluding the carrier from limiting its liability under the Convention was that the required statement on the ticket 'was printed in such a manner as to virtually be unnoticeable and unreadable * * *.' Id., at 857.

Judge McMahon appropriately characterized the 'notice' to the passengers in his pithy conclusion as 'camouflaged in Lilliputian print in a thicket of 'Conditions of contract' * * *. Indeed the exculpatory statements on which defendant relies are virtually invisible. They are ineffectively positioned, diminutively sized, and unemphasized by bold face type, contrasting color, or anything else. The simple truth is that they are so artfully camouflaged that their presence is concealed.'* 253 F. Supp. at 243. Accord, *Warren v. Flying Tiger Line, Inc., supra,* 352 F. 2d at 497. But see *Seth v. British Overseas Airways Corp.,* 329 F. 2d 302 (1st Cir.), cert. denied, 379 U. S. 858 85 S. Ct. 1-4, 13 L. Ed. 2d 61 (1964).

> We agree that a jury could not reasonably have found that the tickets and baggage checks gave the passengers the required notice. The District Court properly granted partial summary judgment striking out these affirmative defenses of appellant." (Emphasis ours.)
>
> Affirmed.

And so the Court held as a matter of law.

To these views former Chief Judge Kalodner subscribed in his dissent in the instant (*Berguido*) case (369 F. 2d 874, 885 et seq. 1966) and repeated same in his dissenting opinion filed in response to petitioner's petition for rehearing in the Court of Appeals, decided 377 C. A. 3, — F. 2d —, decided June 9, 1967, in which he was joined by Chief Judge Staley.

The exact *opposite* view was expressed by Forman, J. for the majority below in the instant case. 369 F. 2d 874, 878 (1966):

> ". . . Appellant urges a theory of unlimited absolute liability in the face of the appellee's alleged failure to comply with Article 3(1) of the Convention. It is argued that Article 17 provides for unlimited absolute liability unless a *carrier* proves that it has complied with Article 3(1). Appellee, urges appellant, having failed to carry its burden of proof is, as a matter of law, liable without fault for the total amount of appellant's damages, under Article 17 of the Convention. Specifically, appellant contends that appellee has failed to prove both actual delivery of the ticket to the decedent and actual delivery of an *adequate* ticket showing (1) all agreed stopping places and (2) the provisions of the Convention which limit a carrier's liability. Although appellant's contention is that the burden of proof is on the carrier, an attempt is also made by appellant to affirmatively show the inadequacy of the ticket, although not the failure to actually deliver that ticket. However, failing acceptance of this

approach, appellant urges that the District Court's finding of no wilful misconduct by the appellee was clearly erroneous.

Appellee contends that the issue of compliance with Article 3(1) of the Convention was eliminated from the case at pre-trial and that, nevertheless, a plaintiff, and not a carrier-defendant, has the burden of proving non-compliance with Article 3(1). Actual non-delivery of the ticket under Article 3(2) is also urged as the only Article 3(1) conduct of a carrier which will defeat the Convention as a defense. As to the question of wilful misconduct, appellee urges that there was substantial basis for the District Court's exonerating it therefrom. Appellee furthermore cross-assigns as error the District Court's grant of the motion for a new trial subsequent to the jury verdict in its favor at the fourth trial, which resulted in the fifth trial from which this appeal has been taken.

The contentions thus having been outlined, we now turn to their disposition.

[5] Appellant has urged that both Grey v. American Airlines and Westminster Bank v. Imp. Airways, Ltd. stand for the proposition that liability under Article 17 of the Warsaw Convention, as an initial matter, is absolute and unlimited. To avoid such liability, a carrier must demonstrate compliance with Article 3(1) of the Convention, argues appellant. Neither case supports the proposition, for the question of whether Article 17 provides such *unlimited* absolute liability for the death of a passenger was not an issue therein. . . . Article 17 itself gives no indication of the extent of a carrier's liability. It must be read with Article 22(1) for the question concerning the extent of the liability to be answered, and an analysis of the question does not support absolute *unlimited* liability as the scheme of the Convention."

We respectfully submit that the decision in the 2nd Circuit is absolutely correct—that the decision of the majority in the instant case is without doubt in error. It is our contention that Warsaw does in fact impose absolute and unlimited liability.

At page 879 of the opinion in the instant case the majority states:

> ". . . an analysis of the question [of the extent of a carrier's liability under Warsaw] does not support absolute unlimited liability as the scheme of the Convention."

This is error. That is precisely what the scheme of the Convention is. The defendant itself conceded at the trial of this case that liability under Warsaw is automatic. Its counsel told the trial court:

> ". . . carriers are automatically liable for injury or death occurring in a crash." (118a)

In its first opinion herein, the Court of Appeals, 317 F. 2d 628, 629 held:

> "The Warsaw Convention provides, inter alia, that the carrier is *absolutely* liable for *all* injuries where the accident causing the damage so sustained takes place on board the aircraft." (Emphasis supplied.)

The Court of Appeals for the Second Circuit has held that that is the scheme.

> "The scheme of the Warsaw Convention is pretty plain on its face. Chapter III is the one which concerns us here. Article 17 imposes an *absolute* liability upon the carrier for *all personal injuries regardless of fault* . . ." per Medina, J. in Grey v. American Airlines, 227 F. 2d 282, 285 (C. A. 2, 1955); cert. denied, 350 U. S. 989 (1956). (Emphasis supplied.)

The Court of Appeals for the Ninth Circuit takes the same view of the Convention's scheme. *Warren v. Flying Tiger Line, Inc.*, 352 F. 2d 494 (C. A. 9, 1965). See also:

Block v. Compagnie Nationale Air France, 229 F. Supp. 801, 805 (D. C. N. D. Ga., 1964).

English decisional law reads the scheme of this uniform international Convention exactly the same way:

> "The effect of the articles above-mentioned [dealing with carriage of goods under the Convention] is, in my opinion, *prima facie,* to render the carrier . . . liable for *any loss* of goods caused or occasioned during carriage by air." Per Lewis, J. in Westminster Bank v. Imp. Airways, Ltd., 2 All. E. R. 890, 895 (K. B. 1936)."

Thus, the Court of Appeals' initial opinion states that the carrier is absolutely liable for all injuries. Grey holds it absolutely liable for all personal injuries regardless of fault. Westminster holds it prima facie liable for any loss. There should be no question that the scheme of Warsaw is one of absolute, unlimited liability. The language in these decided cases could not be clearer. Yet the Court of Appeals (C. A. 3) has held the reverse here.

Westminster and Grey are completely consistent in their understanding of the scheme of Warsaw. The majority's attempted distinction of Westminster on grounds that it was not a passenger case is indefensible. Grey was a passenger case. The scheme of the Convention—initially absolute and unlimited liability—applies uniformly to goods and passengers.

The reasons of policy which support such an accurate construction is perfectly clear. To state it is to underscore the first error of the majority in its opinion. The drafters of the Convention intended to encourage the growth of what more than three decades ago was an infant industry. They did so by designing a scheme which created absolute, unlimited liability from which the carriers got the economically extraordinary opportunity to exclude or limit their exposure to damages. They could realize such exclusion or limitation if, but only if, they first properly delivered adequate notice to shippers and passengers that such exclusion

or limitation existed, so that shippers and passengers would have a fair chance to take steps to protect themselves economically against the Convention's potentially radical limitation or exclusion of damages. *Flying Tiger Line, Inc. v. United States,* 170 F. Supp. 422, 424 (Ct. Cl., 1959) and *Lisi, supra,* at 253 F. Supp. 239. The opinion of the Court of Appeals of the 2nd Circuit in *Lisi, supra,* makes this expressly clear.

Warsaw itself provides that if a carrier does not deliver a ticket to a passenger, it may not avail itself of any exclusions or limitations of the treaty. Article 3(2). Decisional law has held that there must be a proper delivery of the ticket. *Mertens v. Flying Tiger Lines, Inc.,* 341 F. 2d 851 (C. A. 2, 1965); cert. denied, 86 S. Ct. 38 (1965); rehearing denied, 86 S. Ct. 306 (1965), *Warren v. Flying Tiger Line, Inc., supra,* and that there must be an adequate ticket, *Lisi v. Alitalia-Linee Aeree Italiane,* 253 F. Supp. 237 (D. C. S. D. N. Y. 1966).

What are the legal consequences if the carrier does not properly deliver an adequate ticket? Both decisional law and the commentators answer that question very clearly. In *Westminster, supra,* Lewis, J. held at 2 All. E. R. 895:

> ". . . in order to enable the carrier to so exclude or limit his liability he must comply with art. 8(a) to (i) inclusive and (q). . . ." (which specifies every item which must be declared on the waybill).

The *Westminster* waybill did not contain such particulars, and by operation of Article 9 the carrier was denied the right either to exclude or limit its liability. *The court gave judgment for the full amount of goods in question.* Let it be noted that while plaintiff there pressed three theories —the deficiency of the waybill, the carrier's negligence, and the carrier's wilful misconduct—the last two were never reached by the court. Its judgment rested squarely and solely on the fact that Warsaw's initially absolute,

unlimited liability was never removed because the carrier never did what was necessary to exclude or limit its liability—deliver a proper waybill.

What happened under the goods situation in *Westminster* has an exact parallel in the Convention's provisions for the passenger situation. That is this case. It is *Mertens.* It is *Lisi.* It is *Warren.* They are all passenger cases.

Having found an inadequate ticket under Article 3, *Lisi* ruled at pages 239-240:

> ". . . defendant cannot exclude or limit its liability under the Convention in the case at bar."

and at page 243:

> ". . . the challenged affirmative defenses are unavailable to defendant in these actions."

Having found inadequate delivery of a passenger ticket under Article 3, *Mertens* held unanimously at page 856:

> ". . . as a matter of law the delivery of the ticket was not adequate and that the limitation on damages of the Convention is inapplicable."

The case was remanded for trial solely on the issue of damages.

In the history of *Warren, supra,* is the clinching demonstration of what must be done here. At the first trial of *Warren,* the District Court found that Warsaw applied; there was an effective delivery of the ticket, and that, therefore, the plaintiffs were limited to recovery of $8,300.00, 234 F. Supp. 223 (D. C. S. D. Cal., 1964). The Court of Appeals for the Ninth Circuit reversed, holding that Article 3(1) had not been satisfied, and remanded for further proceedings. 352 F. 2d 498.

Following the remand, the United States District Court for the Northern District of California very recently retried Warren under the title of *Glassman et al v. Flying Tiger Line,* 9 Avi. 18, 295 (1966), as it was one of the actions

included in the group of cases decided *eo nomine Warren, supra.* It applied *Warsaw* and held:

> "The scheme of the Convention is plain on its face. *Grey v. American Airlines,* 227 F. 2d 282 (2d Cir. 1955), cert. denied 350 U. S. 989. *Article 17 imposes absolute liability irrespective of fault and because carrier accepted decedents as passengers without tickets having been delivered in the manner contemplated by Article 3(1), Article 3(2) deprives it of the right to limitation granted by Article 22(1), Warren v. Flying Tiger Line, Inc.* [9 Avi. 17,848] 352 F. 2d 494 (9th Cir. 1965), and the right exculpation allowed by Article 20(1). Even if it be assumed that carrier is entitled to claim the benefit of Article 20(1) the court finds that it has not met the almost insurmountable burden required of it. *Grey v. American Airlines, supra.*" (Emphasis supplied.)

Thereafter the carriers did no longer appeal.

Be it noted that *Lisi* granted partial summary judgment denying the carrier its Warsaw defenses and was affirmed at 370 F. 2d 508 (1966). By like token, the Warsaw defenses removed in *Lisi, Mertens and Warren* must be removed here. The remand in *Mertens* points the way. The retrial in *Warren* proves it. The remand here should decree entry of judgment for damages of $375,000 already found by the trial judge plus costs and interest especially since the carrier admitted (118a) it could not prove that it took all necessary measures to avoid the damage or that it was impossible for it to do so. Art. 20(1).

The majority recognizes that *Mertens, Grey* and *Lisi* discuss the legal ramifications of the failure to comply with Article 3(1) (p. 10, fn. 17). But the majority shied away from a discussion of what those ramifications are. We submit *Mertens, Lisi* and *Grey* cannot be read any way other than that the failure to deliver an adequate ticket dispositively fixes the absolute, unlimited liability which the Convention initially creates. *Warren* and *Lisi* both now prove that.

The commentators confirm the operation of Warsaw so clearly announced by *Grey, Westminster, Lisi Mertens* and *Warren.*

> "[The Convention] renders the carrier liable *without* limitation if it fails to issue the proper 'Warsaw' passenger ticket (Article 3, paragraph 2) . . ." (Emphasis supplied.)

Sand, "Air Carriers' Limitation of Liability and Air Passengers' Accident Compensation under the Warsaw Convention", 28 J. Air L. & Com. 260, 262-263 (1962). So too, we find the following statement by Sincoff, "Absolute Liability and Increased Damages in International Aviation Accidents", 52 A. B. A. Journal, 1122, 1123 (December, 1966):

> "Article 3 states that the carrier must deliver a ticket to the passenger. Absent delivery, the carrier is deprived of the benefits of Articles 20, 21 and 22, which exclude or limit liability. In addition, Article 3 requires that the ticket contain a specific statement that the transportation is subject to the liability provisions of the treaty. The obvious purpose of such a statement is to give the passenger notice of the limitation and afford him the opportunity of protecting himself by obtaining accident insurance. Courts have therefore held that a carrier is liable as a matter of law for the actual damages sustained if the ticket is delivered when the passenger is aboard [citing Mertens] or about to board the aircraft, [citing Warren] or if the ticket is unreadable due to Lilliputian-size print. [citing Lisi]."

Despite the clear design of the Convention, and despite *Westminster, Lisi, Mertens* and *Warren,* and the writers on the subject, the majority below in our case held:

> "The District Court . . . as well as finding that appellee was not guilty of wilful misconduct, found that appellee was not even negligent. If this conclusion

is supportable, it is final and *there is no need for us to examine appellant's legal contentions concerning Article 3(1) of the Convention,* which we have set forth in the foregoing paragraph, *for even if those contentions are determined in favor of appellant, they would not dictate a reversal.*" (at 10) (Emphasis supplied.)

This is putting the cart before the horse. We respectfully submit that here lies the manifest error of the majority's opinion. It is error on which the entire result pivots, for if our contentions are accurate—and all of the authorities we have just discussed demonstrate they are—then reversal is exactly what *is* dictated and the questions of negligence and wilful misconduct are no more involved and can no more be reached here than they could in *Westminster, Lisi, Mertens* and *Warren. They are utterly irrelevant.*

The striking fact and law of this matter is that the very contentions which we have urged here were the bases upon which *Westminster, Lisi, Mertens* and *Warren* were decided, and yet the majority here has expressly stated that:

> "... there is no need for us to examine [those] ... contentions ..."

We stated at the outset of this petition that the majority has either failed to apply the authority which rules this case, or has so applied it as to throw it into conflict with decisional law. We respectfully submit that the foregoing discussion amply documents that statement.

IV. An International Flight Ticket Is a Matter Governed by a Contract Subject to the Regulations of the Several Articles of the Convention.

We submit that an airline transports a passenger by virtue of the contract that it makes with him—whether the flight is domestic or international. All that the Warsaw Convention allows the airline to do is limit its liability if

it does so in full accordance with the principles of law applicable to the limitation of liability in any contract. In the instant case the defendant never proved that it abided by the conditions necessary to limit its liability under contract principles.

Contract principles make clear that limitations of damages of the Warsaw Convention did not bind the plaintiff's decedent since the amount of the limitations were not printed on the ticket and because whatever mention there was of reference to the Warsaw Convention was in extremely tiny print at the bottom of the ticket. See *Mertens, Admr. v. Flying Tiger Lines, Inc.*, 341 F. 2d 851, 857.

Plaintiff's decedent was safely transported from Philadelphia to San Salvador and then from San Salvador to Miami by Pan American. Hours later he took this purely domestic fatal Eastern Air Lines flight to Washington. He got no discount for buying the tickets all at one time. He could have bought his ticket for Washington in Miami and avoided the cloud of Warsaw. That he did not justifies the conviction that these meaningless words at the bottom of the ticket communicated nothing to him. Defendant did not prove decedent's awareness of the clause. Even if readable, the words on the ticket make no explanation of the limitation, do not state the amount of the limitation and indeed are misleading for they refer to the rules of international flight. To any reader this flight from Miami to Philadelphia on a local plane was not international in character. We submit under simple contract principles this attempted limitation was void and a nullity as a matter of law.

In a landmark decision, *Henningsen v. Bloomfield Motors, Inc.*, 32 N. J. 358, 161 A. 2d 69, 75 ALR 2d 1 (1960), the Chrysler Corporation had printed in similar fine print a limitation of liability relative to warranties pertaining to an automobile sold to the plaintiff there. In similar fine print there was the phrase "I have read the matter printed on the back hereof and agree to it as part of this order, as if it were printed above my signature. I certify that I am

21 years of age, or older, and hereby acknowledge receipt of a copy of this order." In the instant case, as in *Henningsen,* the phrases in question were the least legible but the most important in evaluating the rights set forth in the instrument. The court held the claimed limitation of liability ineffective.

In *Henningsen* Justice Francis found that the gross inequality of bargaining position occupied by the consumer in the automobile industry is quite apparent. How much truer is this in the case of a public transportation system such as an airline. Perhaps the most telling sentence in *Henningsen* is this (32 N. J. 396):

> "It is not enough merely to show the form of a contract; it must appear also that the agreement was *understandingly* made." (Emphasis supplied.)

Recent law review articles have subscribed wholeheartedly to this view. See *Kessler, Contracts of Adhesion —Some Thought About Freedom of Contract,* 43 Col. L. Rev. 629, 632 (1943). See also Vold, *Law of Sales* (2d Ed. 1959, 447), which recognizes the unequal positions of buyer and seller, particularly of public services such as "transportation."

In *Lachs v. Fidelity & Casualty Co. of New York,* 306 N. Y. 357 (1954) similar finely printed, uninformative legends were to be found on the policy. The Court held the fine print describing the kind of airline to which it was limited could not deprive the insurance purchaser of coverage on this non-scheduled airline flight. This was not a suprising decision. No *affirmative* assent to the fine print was proven. As was noted in that opinion, *average people* who buy tickets or insurance *"are not expected to carry the Civil Aeronautics Act or the Code of the Federal Regulations when taking a plane."* (Emphasis supplied.)

To admit that older cases interpreted the treaty strictly and against the passenger is no more than to say that such strictness existed only because the airlines were in their infancy. The Convention's principle "was one of allowing

only a regulated burden to be the responsibility of the then struggling carriers." *Eck v. United Arab Airlines,* 15 N. Y. 2d 53, 59 (1964). Now, as this Court well knows, the whole picture has changed profoundly. And with this change the courts should limit the application of this harsh law and require carriers to make the paying public meaningfully aware of the situation as a precondition to limiting their liability.

The New York Court of Appeals in *Eck v. United Arab Airlines, supra,* after stating in footnote 2 (p. 59):

> "2. When the Convention was originally drafted in 1926, Charles Lindbergh had not flown to Paris. When it was first adopted Air France had two overseas flights, one from Paris to London and the other from Marseilles to Tunis. Pan American flew from Key West to Havana. The China Clipper flight on Pan American did not take place until 1935, after the United States had become a signatory to the Warsaw Convention in 1934."

adopted the philosophy that the treaty must be interpreted in the light of the present circumstances of the airline industry. If this Court follows this sound philosophy, the limitations of Article 25 of the Warsaw Convention clearly should not be permitted to attach to the present case.

This principle in respect to the necessity for printing a ticket properly in adequate size so that it can be easily read and understood is not novel in the law. In Pennsylvania this principle was adopted as far back as *Lenox v. Greenwich Ins. Co. of N. Y.,* 165 Pa. 575, 577 (1894), in an insurance policy case where the court said:

> " 'It is well known that the evil aimed at in this legislation was the custom of insurance companies to put in their blank forms of application long and intricate questions or statements to be answered or made by the applicant, printed usually in very small type, and the relevancy or materiality not always apparent

to the inexperienced, and therefore liable to become traps to catch even the innocent unwary. *The general intent was to keep these statements before the eyes of the insured, so that he might know his contract, and if it contained errors, have them rectified before it became too late.'* This has since been quoted with approval. See, e.g., Muhlenberg v. Mutual Fire Insurance Company of Sinking Springs, 211 Pa. 432, 433-434, 60 A. 995. As the statute was passed in the interest of fair dealing, its provisions must be strictly complied with in all respects: Ellis v. Metropolitan Life Insurance Company, 228 Pa. 230, 231, 77 A. 460." (Emphasis supplied.)

This was restated in *Ostrov v. Metropolitan Life Insurance Company,* decided C. A. 3, June 27, 1967, as an accurate controlling guide in these cases.

We respectfully submit that a perusal of the tickets which appeared as Exhibit 12 in the trial before Judge Boldt Appendix B here demonstrates beyond question that they are deficient in that they are comparatively illegible and fail to set forth adequately the proposed claim for limitation of liability allowed under the Convention if there is to be compliance with Chapter II, Article 3(1). We respectfully submit that the cases and the authorities mentioned in this brief, *supra,* establish that the ticket here and in *Lisi* were deficient and that therefore the decision in the 2nd Circuit in the Court of Appeals in *Lisi, supra,* is correct and the decision in the instant case in the 3rd Circuit is erroneous.

V. The View of the Solicitor General as to the Lisi Litigation and the Effect of Non-compliance With Article 3(1) of the Convention.

This court made inquiry of the view of the Solicitor General as to the significance of the tickets in the *Lisi* litigation. It received from the Solicitor General an expression of approval of the decision of the Court of Appeals for the 2nd Circuit in that case. He saw no necessity

for a hearing before this court and therefore made a recommendation of denial of certiorari.

The Solicitor General considers the requirement that tickets be printed in proper size, form and degree of legibility to make them easy to read and comprehend as well as to contain in them adequate explicit information in respect to limitations claimed as set forth in *Mertens* and *Warren* and *Lisi* to be the exercise by those courts of "a proper performance of the judicial duties of the courts of contracting states to implement the broad visions of the Convention" (P. 7, Solicitor General's brief). The Solicitor General also approves of the view of the courts in these cases *rejecting* strict literalism and interpreting Articles 3 and 4 of the Convention to require full and revealing notice in readable form. Otherwise Article 3(1) would be purposeless and meaningless. This discussion arose when the airlines contended that since Article 4 which relates to baggage expressly required that the ticket must contain certain particulars, in the absence of which the carrier could not claim the limitation of damages and that since Article 3 which relates to personal injuries did not contain such a requirement that, under the doctrine of *expressio unius est exclusio alterius,* the Convention does not require the express printing of the particulars of the limitations on *passenger* tickets at all. The Solicitor General agrees with the *Lisi* and understandably so.[4] Certainly human life should be held on a par with baggage and certainly the loss of human life is equally as great and as important as the loss of baggage.

The Solicitor General further notes that:

> "Petitioner's contention that the Civil Aeronautics Board 'expressly approved the form and content' of the airline passenger ticket which it used is 'misleading'. The Board did not purport to pass on, much less decide, the size of type, type face, or other typographic

4. Compare the early view as set out in *Grey v. American Airline, supra,* on the application of this rule of construction.

details the airlines should employ in printing the required warning regarding limited liability. Rather, the Board merely approved an intercarrier agreement on the form of the ticket as not adverse to the public interest, since the agreed-upon form constituted a 'substantial improvement' over the one previously in use. Moreover, the Board has not merely criticized the inadequacy of the print size used by the airlines; it has taken affirmative steps and made mandatory that carriers give international passengers additional notice—larger type—regarding limits of liability under the Warsaw Convention. See the Board's ruling at 28 F. R. 11775-11777 (Nov. 5, 1963,) and 14 C. F. R. 221.175." (Op. p. 8, 9)."

Certainly if certiorari is denied in *Lisi* the same legal position as to this petitioner-widow, who is similarly situated but in whose case unfortunately the Court of Appeals for the 3rd Circuit took the opposite point of view as to the law in respect to precisely similar if not more obscure and less informative tickets should be taken. Should this court deny certiorari in *Lisi* it should not foreclose the consideration of this same legal question presented at the same time in this case. Equal justice must be achieved for Mrs. Berguido and her five children in this case too *since the same point of law is involved.* We respectfully submit therefore that the court should now grant certiorari in the instant case, reverse on the authority of *Lisi et al.* and direct the entry of judgment for the petitioner in the sum of $375,000 plus interest and costs especially since admittedly the carrier could not prove it did all it should have done to avoid the accident (118a). See Art. 20.

That recently some 11 years after this crash the C. A. B. has directed that the airlines issue tickets which conform to the opinion of *Lisi* and otherwise now post signs and warnings on its counters in respect to the dollar limitations ($8,300) allowed under the Warsaw Convention should not in any way have any effect in the decision of this case. If

anything, the action of the C. A. B. now serves only to confirm the validity of the *Lisi* holding and the inaccuracy and error of the *Beruguido* holding below as it underwrites what the airline should have had on its tickets in the first place. The failure of the C. A. B. to police the ticket issuance up to now does not and cannot legalize what were improper tickets *ab initio.*

This has been a long and bitter battle by this widow and her five children for fair compensation due to the loss of her husband. Petitioners have borne the back breaking burden and expense of two mistrials, two jury trials and one without a jury, two appeals to the Court of Appeals and two petitions for certiorari. Before this court today appears a record that has thoroughly explored every aspect of the case. We respectfully submit that her rights should not be ignored; that she is in pari materia with *Lisi;* that the two matters should now be heard together and disposed of at the same time and apply the same holding of laws to both.

VI. Wilful Misconduct.

Assuming Pro Arguendo Only That the Court Reject Our Contentions Relative to Article 3(1), (2) of the Convention, Petitioner Contends That the Trial Judge Rendered "Clearly Erroneous" Findings of Fact, Based in Part on Erroneous Legal Rules and Found in Error That Petitioner Did Not Prove That the Carrier Was Guilty of Wilful Misconduct as Required by Article 25.

Facts of the Accident.

The plaintiff's case was simple on its facts. Plaintiff proved that defendant airline's pilot in order to beat the steadily deteriorating weather into Imeson Airport in Jacksonville, Florida *intentionally* descended below the permissible weather minimums hoping that he might make visual contact with the ground at some point, but while trying to execute this dangerous maneuver, got snagged in a

fifty foot pine tree and crashed causing the death of all aboard including plaintiff's decedent. Simply stated he tried an illegal sneak-in landing and failed.

Plaintiff's case was based on a background of a plane in good operating condition with satisfactory instruments on the panel and a properly operating instrument landing system on the ground. Plaintiff overwhelmingly proved that because of poor weather conditions the crew did not and indeed could not make the required visual contact with the runway when they reached the lowest possible minimum permitted by law at that airport under conditions present at that time.

Plaintiff first proved the Civil Air Regulations and rules laid down by Eastern Air Lines' own flight manual which established the absolute prohibition against departing from a glideslope, going below the weather minimums, failing to execute a missed approach and failing to ask authority to leave the glideslope until the pilot had first established actual visual contact with the ground or runway. Intentional violation of any one of these is wilful misconduct. At this juncture we must remember that the official plate required that once a pilot leaves the slope, his weather minimum for visual contact is automatically raised to 400'.

In support of the conclusion that the pilot of this airline did *intentionally* violate these Civil Air Regulations, plaintiff produced three highly qualified aeronautical experts in different phases of aeronautical science.

First—plaintiff produced Major Joseph Glickstein. Major Glickstein is a graduate of the United States Air Force Pilot Training School, a graduate of the United States Air Force Jet Fighter Gunnery Court, a member of the United States Air Force Defense Command and Weather Interceptor Course and a member of the Florida Air National Guard. He has taught in the field of aviation, being an instructor pilot in France, and is currently flying jets in regular up-to-date active service in the Air Force National Guard at Jacksonville, Florida (134a, 135a, 136a),

his home field. This witness categorically expressed an opinion based upon the facts produced by the plaintiff that the pilot of this airplane did *intentionally* and wilfully violate the Civil Air Regulations (583a-598a). He asserted most positively that the pilot was at the time of the crash executing a familiar though illegal approach and landing pattern known as a "sneak-in" or "take a look" maneuver in an effort to make contact by improperly descending below the authorized weather minimums (606a-609a).

Second—Captain Jerry Kepner. Captain Kepner is a senior National Air Lines Pilot who is presently flying jet aircraft between Miami and New York and Los Angeles. He has had twenty-five years' flying experience and had been based at Jacksonville airport for fifteen years. He has made thousands of ILS landings, many of them at Jacksonville (657a, 658a). This capable and experienced pilot testified that in his opinion based on the hypothetical facts as given to him, the pilot of this airplane was illegally using the "sneak-in" pattern [5] and that in doing so did *intentionally* depart from the glideslope and violated the authorized minimum prescribed by the Civil Air Regulation (plaintiff's Exhibit D in the Court below) to see if he could possibly make visual contact with the ground even though he had to go below the legal minimums to do so (666a-671a).

Third—John Prescott Cann is presently a Flight Navigator and Certified Pilot with United Airlines and is the Chief Pilot in charge of Instrument Training for Hortman Aviation Co. He is presently a designated F. A. A. Examiner and formerly was employed by T. W. A. as a flight navigator for a period of fifteen years. He regularly has flown all over the world on recognized top level American commercial airlines (716a-719a). On the basis of the same hypothetical question, he also testified without equivocation that the pilot of this airplane *intentionally* went below the

5. This pattern, though illegal was familiar and known to Eastern Airlines (1100a).

minimums seeking visual contact with the runway (722a-727a).

Thus, the plaintiff presented a solid mass of opinion and conclusions from an experienced military pilot, a commercial pilot of vast experience and a flight navigator presently an F. A. A. Examiner, that on the stated hypothetical facts Eastern's pilot on Flight 642 did intentionally violate the Civil Air Regulations.

Before asking the hypothetical question, plaintiff proved:

1. Flight 642 Eastern Air Lines on the morning of December 21, 1955 had left Miami in perfectly good operating condition in all of its parts, including its engines and all flight navigational instruments and that it had been carefully checked in Miami and that all of its components were found to be in proper order (425a-429a, 445a-446a, 749a-754a).

2. That at no time from the time that Flight 642 left Miami until the crash occurred did the crew which was in vocal radio communication with the tower until a minute or so before the crash, send any message from the plane that would in any way indicate that the plane or any part of it, its instruments, its power plant, its radio and electronic equipment were working improperly or that they were failing to operate in a normal routine usual manner.

3. The Instrument Landing System instruments on the plane which advised the pilot with respect to the glide-slope and the localizer course to follow as well as his altimeter which tells him how high he is above the ground and all other instrumentation that serve a pilot were in good operating condition and functioning properly (366a-367a, 448a).

4. That this flight had been in regular periodic communication with both Eastern radio and the airport controllers at Jacksonville airport almost immediately up to the moment of the crash and no complaints or any observation of improper functioning of the plane or any of its

components or instruments were reported by the crew (247a-260a, 280a-295a, 771a-773a).

5. That the instrument landing system on the ground was in proper operating condition and was emitting the proper beam both insofar as the marker beacon transmitters at the outer marker and the inner marker were concerned; that the localizer course radio beam was functioning accurately; the glideslope radio beam and localizer beam had functioned properly fifteen minutes before the accident and at 6:20 A. M. when tested again after the accident (Plaintiff's Exhibits 37a through 37w at trial and deposition of Mack R. Wood, 1062a-1086a, 340a-348a, 294a, 246a, 427a, 428a) it worked properly.

6. That in the last 200 feet of the flight path the aircraft was being flown at a speed approximately 140 knots and had been descending at an angle of 2½ degrees and at a rate of descent of approximately ten feet per second (509a, 510a, 912a-918a), proving a sound plane under complete pilot control right to crash impact.

7. That as that plane approached the area immediately surrounding the airport there was heavy fog from the ground up (240a-241a, 298a, 334a, 1047a, 334a-335a).

8. That the weather was reported at the airport officially as being 300 feet indefinite, half mile visibility, 10/10ths obscuration (10/10ths means one hundred percent), and ground fog, and that the wind was north eight (368a-369a).

9. That at the impact scene the fog was reported to have covered the tops of trees 60′ high (334a-335a).

10. That just prior to impact the plane was in a slight turn to the right and banked approximately 11½ degrees (510a).

11. That the plane descended below the glideslope and struck some pine trees at a point about 3500′ before reaching the touchdown point of runway 5 and was about 260′ to the left of the localizer center line extending from

the runway and about 200′ below the glideslope, and then having struck the pine tree, proceeded several hundred feet more where it struck an oak tree approximately 50′ in height and sheared it away at about 20′ from its top, after which it then crashed to the ground. The farthest piece of wreckage was 801′ from the first tree it had hit thus establishing that the plane even through all this was still under tight control and that this crash was not that of a plane suddenly losing its power causing it to plummet nose down into the ground; that the impact area was approximately 212′ northwest of the middle marker and 3486′ from the end of runway 5 (476a, 477a, 439a, 441a).

12. That after the crash, the left landing light was found to be in a retracted position and operating normally (444a), which we show, *infra*, corroborates the dense fog present and utter lack of visual contact with the runway.

All of these facts spelled out a clear picture of what happened—the underlying scenario scheme. In sum, plaintiff by virtue of her marshalling of the factual material with respect to this case and by then submitting it to three qualified experts, produced an irrefutable case of wilful misconduct. This was a clear case, accurately, convincingly and thoroughly proven in every minute detail, particularly by physical facts which simply could not be ignored. It would be expected that Eastern with its vast reservoir of experts would call men who would contradict plaintiff's evidence and theory if there were any who would so testify. This it did not do. The inferences that flow from such silence need not here be spelled out.

Defendant erected its main defense around unidentified jets which it claimed were present near the scene of the accident. For this defense it relied upon the testimony of two housewives *who did not see jets* but claimed they heard them (Mrs. Farish and Mrs. Lubin, 940a, 943a, 956a, 961a) and one Wheeler—a relative of an Eastern Air Lines Supervisor—who claimed that he was passing through the area in a truck and claimed he saw the *silhouettes* of two jets (972a) in the dense fog. The depositions of all three

of these witnesses read into the record are a blob of vagueness, self-contradiction and seemingly deliberate misstatements.

In rebuttal to this testimony, *which was entirely by deposition,* plaintiff produced by deposition the testimony of Charles R. Young and Thaddeus Taylor who heard the plane and said it was not a jet (334a, 1049a-1050a, 1043a, 1045a). Plaintiff also produced as a live witness, Franklin Cardwell, a National Airlines Flight Engineer with twenty years professional experience, who previously had testified at the C. A. B. hearing and also unequivocally stated at this trial that he had been *affirmatively* listening and did not hear jets (744a-745a) but only the distinctive sound of a propeller driven Constellation. All lived, and were within yards of the crash when it happened.

Most importantly, Admiral Greenslade and Major Tobin at the request of the C. A. B. checked the official records of all military installations within an area of five hundred miles of Jacksonville and found that no military jets were aloft in that area at the time (1052a-1053a, 1059a-1061a). All jets at that time were military jets (945a).

In addition, William T. McKinney, the United States radar operator at the Jacksonville tower whose job it was to check the radar scope to watch the instrument landing approach of Flight 642 said there were no planes except Eastern Flight 642 on the scope in a ten-mile range up to an altitude of 10,000 feet (256a-257a). In addition, both he and Lawrence R. Robinson, the other F. A. A. men in the tower *affirmatively* listened and heard only one plane aloft—the Constellation (propeller plane). They insisted there was no jet over the airport (247a, 248a, 259a, 282a, 283a).

Against this background, Judge Boldt found that there was a "substantial and reasonable probability" that jets caused the accident and that therefore the defendant was not guilty of wilful misconduct. This finding was clearly erroneous requiring at least a new trial. There have now been five trials. The evidence on this point was by way

of deposition. Hence this Court has the power to make its own independent finding regarding jets. In so doing, after making its own analysis of these depositions, it has the complete power to reject the finding of jets and may conclude factually that the carrier was guilty of wilful misconduct. Indeed since the proof was by deposition petitioner does not have the burden of proving that the judge's findings are "clearly erroneous" in order to have them set aside and need only prove that her own evidence is weightier. *Surgical Supply Service Inc. v. Adler,* 321 F. 2d 536, 539 (C. A. 3, 1963). Actually the finding of jets is simply and plainly "clearly erroneous".

The trial judge (Boldt, J.) who heard the facts without a jury predicated his conclusions of no negligence or wilful misconduct solely and exclusively upon a fact finding that there were military jets which cut across the path of the Constellation in which the plaintiff's decedent was a passenger, causing it to crash. Thus at the end of the trial he rendered an oral opinion (1255a) in which he said:

> "2. It is my opinion, and I now so find, there is not a preponderance of credible evidence showing a substantial or reasonable probability that the Flight 642 crew, or any of them, *under other than emergency conditions* knowingly and intentionally brought the plane to a position below the minimums prescribed for an ILS approach, or knowingly and intentionally violated any other regulation for or requirement of a proper ILS approach. (Emphasis supplied.)
>
> 3. *In my opinion there is substantial and reasonable probability shown by a preponderance of the evidence that the presence of jet aircraft in or near the ILS glide slope for Runway 5 and in or near the immediate pathway of the landing approach of Flight 642 threatened or interfered with the approach of Flight 642, bringing about emergency conditions and accident resulting in the crash without wilful misconduct, negligence or fault*

on the part of defendant or any member of the crew of Flight 642. (Emphasis supplied.)

4. The actual cause of the crash of Flight 642 cannot be determined on the record before me, and I find wilful misconduct as a cause of the accident to be no more than one possibility, among others.

In any event, wilful misconduct, in my judgment, is far less probable as a cause of the crash than the highly probable presence and actions of jet aircraft in or near the ILS approach path of Flight 642.

As just stated, I believe there is substantial probability that one or more jet aircraft were in or near the immediate vicinity of the ILS glide slope leading to Runway 5 during the landing approach of Flight 642 within a very short period of time prior to the plane crash.'' (Emphasis supplied.)

Defendant's brief below sought to avoid the tenuous jet finding issue and rely upon other findings by the trial judge. It stated "His [Judge Boldt's] evaluation of the testimony concerning jets (Fn.) was necessarily affected by his judgment concerning the credibility of plaintiff's expert witnesses" (p. 19). But the opinion of the court shows that the converse is true: the finding of the presence of jets compelled him to disbelieve the plaintiff's experts. At 1253a the trial judge quoted from the case of *Smith v. Bell Telephone Company,* 397 Pa. 134, and he stated that the burden on the plaintiff was to produce evidence to prove the conclusion sought so . . . "as to outweigh in the mind of the fact-finder any other evidence and reasonable inferences therefrom which are inconsistent therewith".

After stating this law the judge then made the following finding (1255a):

"2. It is my opinion, and I now so find, there is not a preponderance of credible evidence showing a substantial or reasonable probability that the Flight

642 crew, or any of them under *other than emergency conditions* knowingly and intentionally brought the plane to a position below the minimums prescribed for an ILS approach, or knowingly and intentionally violated any other regulation for or requirement of a proper ILS approach." (Emphasis supplied.)

He then described what those emergency conditions were, viz: *the presence of jets* (Finding #3) (1255a), and then concludes (1255a):

> "In the event, wilful misconduct, in my judgment, is far less probable as a cause of the crash than the *highly probable presence and actions of jet aircraft* in or near the ILS approach path of Flight 642." (Emphasis supplied.)

Thus, contrary to the base upon which defendant builds its argument, it is clear that Judge Boldt's rejection of the testimony of plaintiff's experts was a result of his finding of jets. We submit that no one can read the opinion of the court below without agreeing that the finding of jets is its pivotal point.

The defendant tried to make light of the jet issue and discussed it only in a footnote (p. 19, footnote 13) in its brief below. Plaintiff reviewed the testimony in detail there and now here. The reason for carrier's avoidance of the jet issue is obvious. It has never been able to combat plaintiff's overwhelming proof that there were no jets present. It is most significant that carrier did not even mention in its footnote treatment in its brief below the most compelling testimony in the record, i.e., that of Admiral Greenslade and Major Tobin that they had no record of any jets in the area at the time, and the only jets in existence were military jets. In simple fairness how could such testimony be ignored? The thrust of all the official proof was irresistible: There were no jets.

In explanation of how he reached this conclusion that jets were present which affected the descent of Flight #642 Judge Boldt applied the rule of positive v. negative testimony. He misunderstood the rule and applied it incorrectly. Thus he said (p. 1256a):

> "To me, *affirmative* testimony as to seeing objects and hearing sounds, when unequivocal, reasonable and ringing true to the trier of fact is far more persuasive and convincing than testimony that said sights or sounds were not seen or heard by other witnesses having opportunity and occasion to see and hear. On this subject, the *negative* testimony in this case whether taken singly or as a whole, in my mind does not balance or outweigh the affirmative testimony. The testimony of Greenslade and others to the effect that no military jets were reported or recorded as operating in the Jacksonville area at the time, while given full consideration, does not convince me that jet aircraft were not or could not have seen and heard at the time and place indicated in the testimony of Wheeler, Lubin and Farrish." (Emphasis supplied.)

The Judge obviously labelled all the petitioner's evidence on jets as negative proof. Apparently to the judge's mind if one paying attention by looking or listening for a sight or sound says that despite such attention, he neither saw nor heard such occurrence, such testimony is negative and *must* be disregarded in the face of oral testimony in which another says he saw or heard the occurrence. This is not the law. Such denial of an occurrence or sight is just as much *positive* proof as testimony by another that he saw or heard it. But misconception of the law compelled his finding of jets. At least it is the only respectable explanation for so gross a misconclusion. One does not have to say "yes" to make his testimony positive. A "no"

may under proper factual circumstances be positive proof as well.

Summary of Wilful Misconduct Argument.

This accident occurred in the middle of the night at approximately 3:45 A. M. Two employees of the United States worked as air traffic controllers at the federal air control center at the tower at Jacksonville that night. They were totally experienced in aircraft, their sounds, movement and action. They testified without hesitancy or doubt that they were listening and heard only one plane overhead the airport and that that plane was a propeller driven Constellation which travelled the natural flight path that the fatal flight of #642 (a Constellation) would normally follow as it circled the airport prior to making its approach to runway 5. Moreover these men had the benefit of scanning the radar scope which would reveal all planes within a range of ten miles in all directions of the airport. They insisted that they saw only one plane on the scope and that that plane flew right on line with the path that the fatal Constellation would be flying in making an approach to runway 5. Superimposed on all of this testimony was official documentary evidence given by each and every branch of the military service which alone flew jets in that area. There were a number of others called by petitioner, both trained in aviation work and laymen who lived for many years in the vicinity who positively stated there was only one plane in the area and that that plane was a propeller driven vehicle. This array of proof completely and totally proved that there were no jets aloft at that time within a distance of 500 miles in all directions of the airport.

In the face of such compelling evidence, the trial judge nonetheless stated that he believed three witnesses called

by defendant who gave testimony about jets which admittedly they did not see, which was so self-contradictory and so palpably untrue as to lead even the majority to say that "the evidence supporting it (jets) is exceedingly thin."

In the light of this admission, common justice requires that this Court overrule the trial judge's finding in this respect as so vigorously urged by the minority below since it falls completely within the rule of *Surgical Supply Co. v. Adler,* 321 F. 2d 536, 539 (C. A. 3, 1963); *Mobile Tankers Co. S. A. & Sacony Oil Co., Inc. v. Mene Grande Oil Co.,* 363 F. 2d 611 (C. A. 3, 1966) and is not covered by the "clearly erroneous" rule. Under this rule this court is completely free to make its own findings of fact because the testimony was given by *deposition* and therefore it may reject the trial judge's findings when it finds other conclusions more logical and credible. Even were this Court to apply the "clearly erroneous" rule, it would be compelled in simple justice to hold that that finding of jets was "clearly erroneous" because anyone reviewing the "entire testimony must be left with a definite and firm conviction that a mistake has been committed". *United States v. U. S. Gypsum Co.,* 333 U. S. 364.

The trial judge made a hodge-podge of inconsistent fact findings on the score of the defendant's negligence. Having found that the defendant was free of all fault he still strangely awarded $8,300 in damages to the plaintiff, *which under Art. 20 he had no power to do if the defendant was totally free of fault.* His finding that there were jets was clearly speculative and mere speculation cannot be allowed to do duty for probative facts. *Galloway v. United States,* 319 U. S. 372, 395 (1943); *Noel v. United Aircraft Corp.,* 342 F. 2d 232, 239 (3rd Cir. 1964). He confused the rule relative to *affirmative* testimony and held that though a number of witnesses had positively stated that there were no jets in the air, that that testimony amounted to *negative* testimony and applied the rule that negative proof has no probative value even though they had affirmatively stated that there

were not jets present, and even though those witnesses were actively looking and listening for aircraft movement. This was in complete disagreement with the law of the Third Circuit stated by our own Judge Biggs in *Eiseman v. P. R. R.*, 151 F. 2d 222 (3rd Cir. 1945), and the Supreme Court of Pennsylvania in *Enfield v. Stout*, 400 Pa. 6 (1960) and this misconception of the positive v. negative rule led him via legal error into gross mistake in his finding of jets.

The trial judge found that "the actual cause of the crash of Flight #642 cannot be determined on the record before me "but then ignored the fact that where a crash of this kind occurs and a plane falls short of the runway while on the direct path to the runway, it creates a clear *res ipsa loquitour* situation which requires submission of the case to the jury and that on failure of the carrier to offer proof to the contrary, a verdict for the plaintiff should have been rendered. And this is especially true when the carrier admits that it had no exculpatory evidence to offer for itself (118, 119[a]). Thus in *Citrolla v. Eastern Airlines, Inc.*, 264 F. 2d 815 (C. A. 3, 1959), *a case arising out of this very same crash*, that plaintiff prevailed on simple negligence predicated on *res ipsa loquitur*, under these precise facts since her passenger was not engaged in an international flight. Moreover since admittedly #642 violated the Civil Air Regulations by going below the minimum permissible in that weather, the carrier was guilty of wilful misconduct. *Tuller v. K. L. M. Royal Dutch Lines*, 292 F. 2d 775 (C. A. D. C. 1961).

The attempt by the trial judge to stifle the appellate courts in their review of his exceptional actions and rulings, by stating that he did not consider any evidence to which the plaintiff objected and accepted all the evidence which the plaintiff offered, although objected to by the defendant is an old and weary ploy to prevent a reversal by the appellate courts on rulings on evidence and is part and parcel of the trial judge's conduct in this case to which all fair men must react with a fierce sense of justice gone awry. If ever

a plaintiff proved a case of wilful misconduct it was here. The plaintiff called as experts an extraordinary array of expert aviation talent including a 20-year man in piloting National Airlines planes of all descriptions including the latest jets—a Navy pilot of 15 years experience, a TWA Navigator and flight engineer and pilot of many years experience, a world famous heart specialist and Professor Emeritus at the University of Pennsylvania Medical School [6] and a leading meteorologist, Dr. Francis Davis of Philadelphia weather fame, all of whom the judge blasted—utterly without basis as untrustworthy of belief. Instead he accepted the testimony of a truck driver related to an Eastern Airlines employee. Even after this witness's testimony had been doctored by an Eastern Claims Agent to get him into the crash area on time so as to be able to have seen or heard anything which was impossible under his first story, at best he still only claimed to have allegedly seen (but not heard) the silhouettes of jets in the pea soup clouded sky. The judge also relied on a confused housewife who, awakened from her sleep by the noise of the crash, said contradictory things about what she heard but did not see, and another lady who had at the C. A. B. hearing very insistently said she heard only one (1) plane but changed her testimony at the trial to meet the carrier's story of two (2) planes on the scene. In checking the trial record of the first trial though the carrier already had the depositions of these two ladies, it evidently considered them of such low probative value that it did not offer those selfsame depositions in evidence at that trial.

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6. Petitioner proved from respondent's own records that one of its pilots on this plane had forged his medical certification required by the C. A. B. and that both pilots had high blood pressure and heart conditions of which they were each aware. If petitioner's proof of attempted sneak-in be rejected, at least the judge should have found that the accident was caused by heart failure or stroke of the pilot who in clear wilful misconduct had knowingly been permitted to fly a commercial passenger plane despite his serious heart and blood pressure ailments of which the airline was *aware* rather than accept the dubious defense of jets which even the majority characterized as "exceedingly thin".

This resumé must shock all who read this record and render them compelled vigorously to attack these findings as they represent a manifest miscarriage of justice. The pages of this record blare out in unison one of the most shocking pages of wanton misconduct and gross negligence in the history of American aviation. The findings of no wilful misconduct is simply a stubborn, confused and unsupportable piece of judicial mockery.

Respectfully submitted,

B. NATHANIEL RICHTER,
SEYMOUR I. TOLL,
Counsel for Petitioners.

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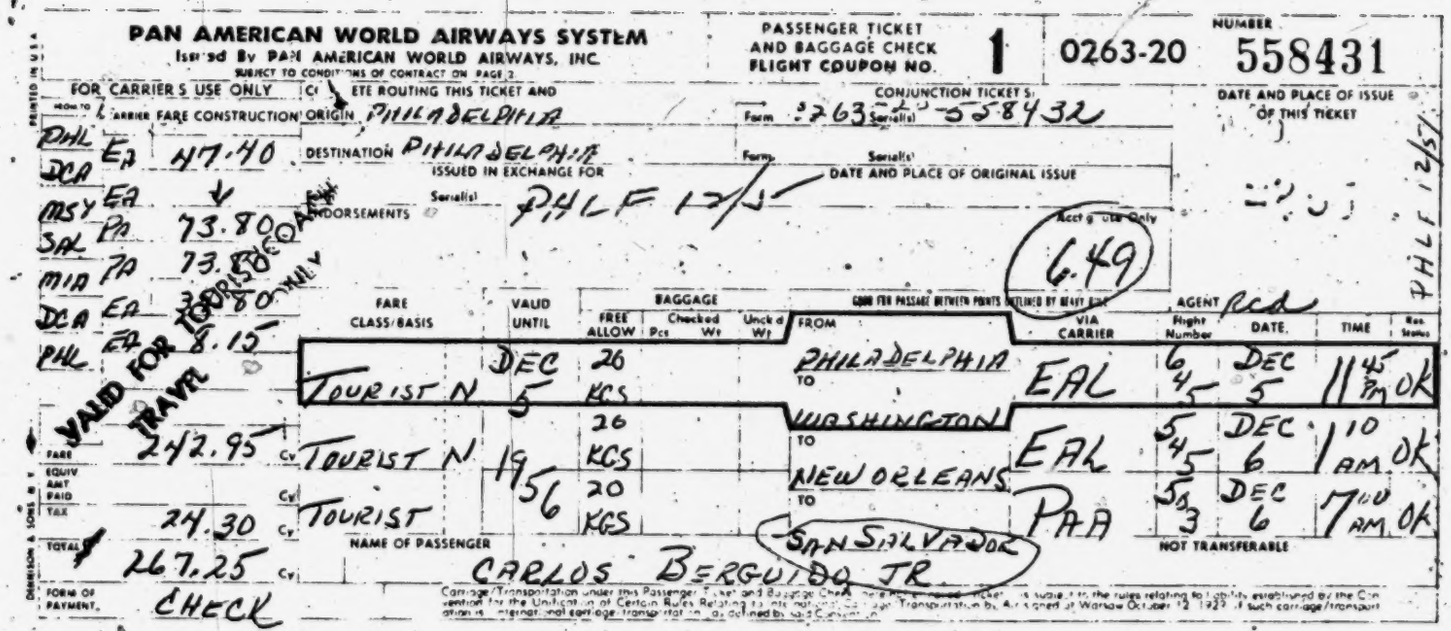

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TOURIST N	DEC 5	26 KGS				PHILADELPHIA / WASHINGTON	EAL	645	DEC 5	11 45 PM	OK
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FARE 242.95 Cy

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TOTAL 267.25 Cy

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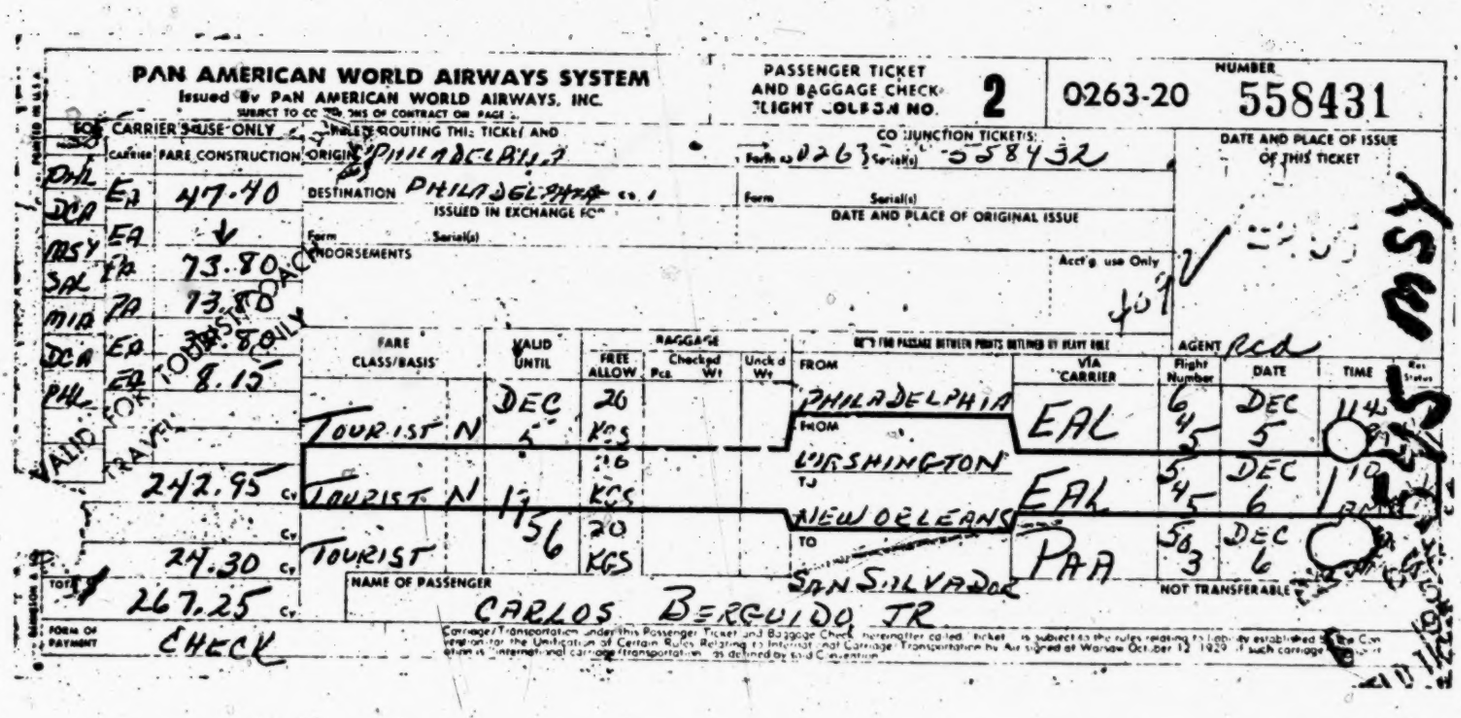

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VALID FOR TRAVEL	
	242.95 Cr
	Cr
	24.30 Cr
TOTAL	267.25 Cr

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FARE CLASS/BASIS		VALID UNTIL	BAGGAGE FREE ALLOW	Checked Pcs. Wt	Unck'd Wt	FROM	VIA CARRIER	Flight Number	DATE	TIME	Res Status
TOURIST	N	DEC 5	20 KGS			PHILADELPHIA	EAL	645	DEC 5	1145	
TOURIST	N	12 56	20 KGS			FROM WASHINGTON TO NEW ORLEANS	EAL	545	DEC 6	110 AM	
TOURIST			20 KGS			TO SAN SALVADOR	PAA	503	DEC 6		

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NAME OF PASSENGER: CARLOS BERGUIDO JR

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PASSENGER TICKET AND BAGGAGE CHECK FLIGHT COUPON NO. **3**

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FOR CARRIER'S USE ONLY

COMPLETE ROUTING THIS TICKET AND ENDORSEMENTS

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DESTINATION PHILADELPHIA

CONJUNCTION TICKET(S) Form 0263 Serial(s) 558432

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DATE AND PLACE OF ISSUE OF THIS TICKET (85)

Agent's use Only

HONORED

AGENT

CARRIER	FARE CONSTRUCTION
DHL	
DCA	EA 47.40
MSY	EA ↓
SAL	PA 73.80
MIA	PA 73.80
DCA	EA 38.75 ONLY
PHL	EA 08.15

FARE	247.95 Cr
EQUIV. AMT PAID	Cr
TAX	24.30 Cr
TOTAL	267.25 Cr
FORM OF PAYMENT	** CHECK

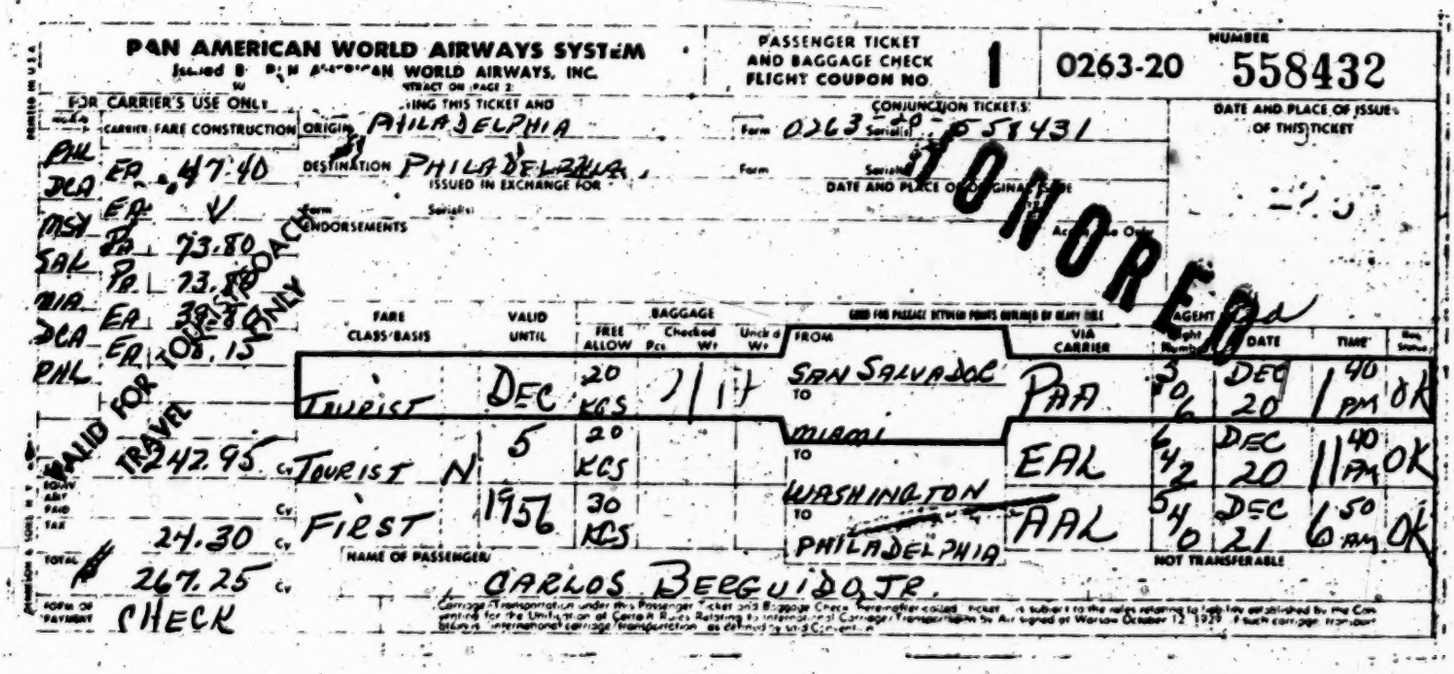
CLASS/BASIS		VALID UNTIL	BAGGAGE FREE ALLOW	Checked Pcs. Wt	Unch'd Wt
TOURIST	N	DEC 5	20 KGS		
TOURIST	N	14 56	20 KGS		
TOURIST			20 KGS	2	18

FROM	TO	VIA CARRIER	Flight Number	DATE	TIME	Status
PHILADELPHIA	WASHINGTON	EAL	615	DEC 5	11:45 AM	OK
WASHINGTON	NEW ORLEANS	EAL	543	DEC 6	10 AM	OK
NEW ORLEANS	SAN JUAN	PAA	263	DEC 6	7 PM	OK

NAME OF PASSENGER CARLOS BENCUIDO JR. MR

NOT TRANSFERABLE

Carriage/Transportation under this Passenger Ticket and Baggage Check hereinafter called "ticket" is subject to the rules relating to liability established by the Convention for the Unification of Certain Rules Relating to International Carriage/Transportation by Air signed at Warsaw October 12, 1929, if such carriage/transportation is "international carriage/transportation" as defined by said Convention



PAN AMERICAN WORLD AIRWAYS SYSTEM
Issued by PAN AMERICAN WORLD AIRWAYS, INC.
SUBJECT TO CONDITIONS OF CONTRACT ON PAGE 2

PASSENGER TICKET AND BAGGAGE CHECK
FLIGHT COUPON NO. 1

NUMBER 0263-20 558432

FOR CARRIER'S USE ONLY

ISSUING THIS TICKET AND CONJUNCTION TICKETS:
Form 0263 Serial 558431

DATE AND PLACE OF ISSUE OF THIS TICKET

ORIGIN PHILADELPHIA
DESTINATION PHILADELPHIA
ISSUED IN EXCHANGE FOR
DATE AND PLACE OF ORIGINAL ISSUE
ENDORSEMENTS

DISHONORED

CARRIER	FARE CONSTRUCTION
PAA	
DCA	EA 47.40
MSY	EA V
SAL	PA 73.80
MIA	PA 73.80
DCA	EA 38.80
PHL	EA 108.15

VALID FOR TRAVEL ON JET COACH TOURIST ONLY

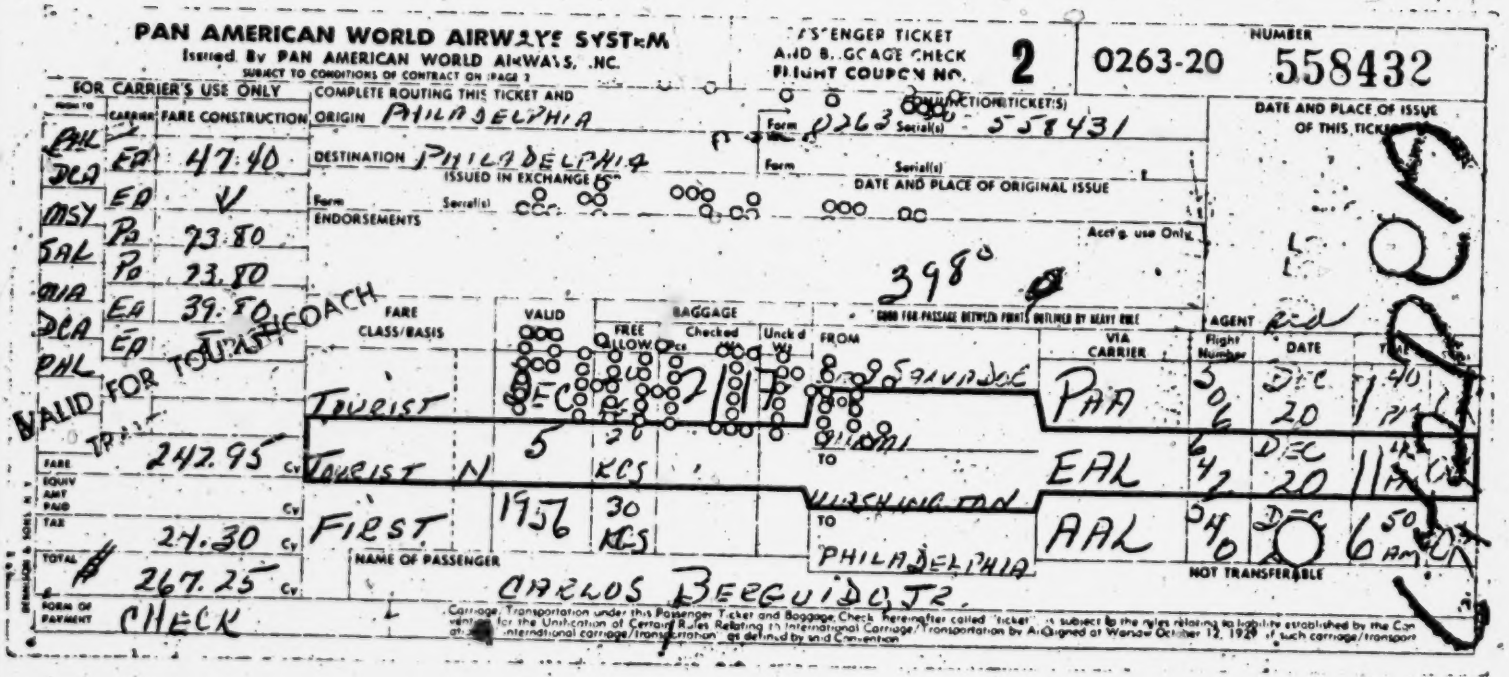
	FARE CLASS/BASIS	VALID UNTIL	BAGGAGE FREE ALLOW	Checked Pcs	Checked Wt	Unch'd Wt	FROM / TO	VIA CARRIER	Flight Number	DATE	TIME	Non Smoking
	TOURIST	DEC	20 KGS	1	1		SAN SALVADOR / MIAMI	PAA	906	DEC 20	1 40 PM	OK
242.95 Cr	TOURIST N	5	20 KGS				MIAMI / WASHINGTON	EAL	642	DEC 20	11 40 AM	OK
24.30 Cr	FIRST	1956	30 KGS				WASHINGTON / PHILADELPHIA	AAL	540	DEC 21	6 50 AM	OK
TOTAL 267.25 Cr												

NOT TRANSFERABLE

NAME OF PASSENGER CARLOS BEEGUIDO JR.

FORM OF PAYMENT CHECK

Carriage / Transportation under this Passenger Ticket and Baggage Check hereinafter called "ticket" is subject to the rules relating to liability established by the Convention for the Unification of Certain Rules Relating to International Carriage / Transportation by Air signed at Warsaw October 12 1929 unless such carriage / transportation is not "international carriage / transportation" as defined by said Convention.



PAN AMERICAN WORLD AIRWAYS SYSTEM
Issued By PAN AMERICAN WORLD AIRWAYS, INC.
SUBJECT TO CONDITIONS OF CONTRACT ON PAGE 2

PASSENGER TICKET AND BAGGAGE CHECK
FLIGHT COUPON NO. 2

0263-20 NUMBER 558432

FOR CARRIER'S USE ONLY

FROM/TO	CARRIER	FARE CONSTRUCTION
PHL		
DCA	EA	47.40
MSY	EA	V
SAL	PA	73.80
MIA	PA	73.80
DCA	EA	39.50
PHL	EA	TOURIST COACH

VALID FOR TOURIST

TP 242.95 Cv

FARE 242.95 Cv
EQUIV AMT PAID
TAX 24.30 Cv
TOTAL $ 267.25 Cv
FORM OF PAYMENT CHECK

COMPLETE ROUTING THIS TICKET AND
ORIGIN PHILADELPHIA
DESTINATION PHILADELPHIA
ISSUED IN EXCHANGE
Form Serial(s)
ENDORSEMENTS

CONJUNCTION TICKET(S)
Form 0263 Serial(s) 558431
Form Serial(s)
DATE AND PLACE OF ORIGINAL ISSUE

Acct's use Only
398

GOOD FOR PASSAGE BETWEEN POINTS OUTLINED BY HEAVY RULE

AGENT

FARE CLASS/BASIS	VALID	BAGGAGE FREE ALLOW.	Checked	Unck'd	FROM	VIA CARRIER	Flight Number	DATE	TIME
TOURIST	DEC	2	11		PHILADELPHIA	PAA	306	DEC 20	1 40 PM
TOURIST N	5	20	KGS		WILMINGTON TO	EAL	42	DEC 20	11 45 AM
FIRST	1956	30	KGS		WASHINGTON TO PHILADELPHIA	AAL	540	DEC 20	6 50 AM

NOT TRANSFERABLE

NAME OF PASSENGER CARLOS BEEGUIDOJR.

Carriage/Transportation under this Passenger Ticket and Baggage Check hereinafter called "ticket" is subject to the rules relating to liability established by the Convention for the Unification of Certain Rules Relating to International Carriage/Transportation by Air signed at Warsaw October 12, 1929 if such carriage/transportation is "international carriage/transportation" as defined by said Convention

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15156

MARION J. BERGUIDO, INDIVIDUALLY; MARION J. BERGUIDO, ROBERT G. ROWE AND WARREN H. WOODRING, EXECUTORS OF THE ESTATE OF CARLOS BERGUIDO, JR.; AND JUNE BERGUIDO, JOY BERGUIDO, JILL BERGUIDO AND CARLOS BERGUIDO, 3D, BY THEIR GUARDIAN MARION J. BERGUIDO,

Appellants

v.

EASTERN AIR LINES, INCORPORATED

ON PETITION FOR REHEARING BY MARION J. BERGUIDO, ET ALS.

Before: STALEY, *Chief Judge*, BIGGS, MCLAUGHLIN, KALODNER, HASTIE, FORMAN, SMITH, FREEDMAN and SEITZ, *Circuit Judges*

OPINION OF THE COURT

(Filed June 9, 1967)

PER CURIAM:

The petition for rehearing is denied.

KALODNER, *Circuit Judge*, dissenting

I would grant the petition for rehearing for these reasons:

(1) The trial court's $8300 award to the plaintiffs after it had found that they had suffered damages of $375,000 was based on fact-findings which were "clearly erroneous" and, against the overwhelming weight of the evidence; the trial court applied erroneous legal standards in its categorization of evidence as "negative" and rejected it for that reason; the fact-findings were based on rank speculation as evidenced by the trial court's statement that "*the actual cause of the crash of Flight 642 cannot be determined on the record before me. . .*"; (emphasis supplied) and the trial court's fact-findings were inconsistent, and its judgment was inconsistent with its fact-findings;

(2) the trial court and this Court have failed to give effect to dispositive provisions of the Warsaw Convention which (a) accord the presumption of negligence on the part of a carrier where one is killed or injured aboard a plane and (b) make unavailable to the carrier the liability limitations of the Convention where there has been a failure to deliver a passenger ticket which advises the passenger of such limitations.

In my dissent reported at 369 F.2d 874, 880-886 (3 Cir. 1966), I spelled out in detail the respects in which the trial court and this Court failed to give effect to the provisions of the Warsaw Convention.

It would serve no useful purpose to here restate what I said in my dissent on the score stated.

Attention, however, must be called to the fact that the United States Court of Appeals for the Second Circuit, subsequent to the filing of my dissent, has, at 370 F.2d 508 (1966), affirmed Lisi v. Alitalia-Linee Aeree Italiane, 253 F. Supp. 237 (S.D.N.Y. 1966), where it was held that a

passenger ticket similar to that here involved failed to comply with the requirement of the notice provisions of Article 3(1)(e) of the Warsaw Convention and that the liability limitations of the Convention were for that reason not available to the carrier.

In affirming, the Second Circuit, after quoting the relevant liability-limiting Articles of the Convention, said at 370 F.2d 511-514:

> "These Articles, moreover, provide that the ticket and check shall contain certain specified information, including 'a statement that the transportation is subject to the rules relating to liability established by this convention.' Thus, it would appear, that unless the carrier furnishes to the passenger a ticket or baggage check containing the appropriate statement, it may not restrict its liability as circumscribed by the Convention Articles.
>
> * * *
>
> "The Convention's arbitrary limitations on liability which have been severely and repeatedly criticized—are advantageous to the carrier. But the *quid pro quo* for this one-sided advantage is delivery to the passenger of a ticket and baggage check which give him notice that on the air trip he is about to take, the amount of recovery to him or his family in the event of a crash, is limited very substantially. Thus the passenger is given the opportunity to purchase additional flight insurance or to take such other steps for his self-protection as he sees fit.
>
> "This notice to passengers is especially important in this country where the overwhelming number of people who travel by air do so on domestic flights, for which the Convention's restrictions on liability are inapplicable. It is too much to expect these passengers to be sufficiently sophisticated to realize that although they are traveling the same number of miles on an international flight that they have frequently traveled

domestically, the amount they may recover in the event of an accident is drastically reduced. . . .

"We proceed to determine, therefore, whether the particular tickets and baggage checks involved in the present case gave the appellees adequate notice. On the front of the ticket and baggage check, in exceedingly small print, was the following message: 'Each passenger should carefully examine this ticket, particularly the Conditions on page 4' . . . .

"Judge MacMahon appropriately characterized the 'notice' to the passengers in his pithy conclusion as 'camouflaged in Lilliputian print in a thicket of "Conditions of Contract". * * * Indeed the exculpatory statements on which defendant relies are virtually invisible. They are ineffectively positioned, diminutively sized, and unemphasized by bold face type, contrasting color, or anything else. The simple truth is that they are so artfully camouflaged that their presence is concealed.' 253 F. Supp. at 243. Accord, Warren v. Flying Tiger Line, Inc., supra, 352 F.2d at 497. But see Seth v. British Overseas Airways Corp., 320 F.2d 302 (1st Cir.), cert. denied, 379 U.S. 858, 85 S.Ct. 114, 13 L.Ed.2d 61 (1964).

"We agree that a jury could not reasonably have found that the tickets and baggage checks gave the passengers the required notice. The District Court properly granted partial summary judgment striking out these affirmative defenses of appellant."

The disposition made by this Court at 369 F.2d 874 in the instant case is in conflict with that made by the Second Circuit and for that reason alone requires the granting of the petition for rehearing.

Chief Judge Staley joins in this dissent.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX D

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Present: BIGGS, KALODNER and FORMAN, *Circuit Judges.*

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed September 30, 1964, be, and the same is hereby affirmed, with costs.

ATTEST:

IDA O. CRESKOFF,
Clerk.

November 23, 1966.

APPENDIX E

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT. SUR PETITION FOR REHEARING.

Present: STALEY, *Chief Judge*, BIGGS, MCLAUGHLIN, HASTIE, FORMAN, SMITH, FREEDMAN and SEITZ, *Circuit Judges*.

The petition for rehearing filed by Appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

ATTEST:

THOMAS F. QUINN,
Clerk.

Dated: June 9, 1967.

STALEY, *Chief Judge*, and KALODNER, *Circuit Judge*, dissent from the denial of the petition for rehearing.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15156

MARION J. BERGUIDO, INDIVIDUALLY, MARION J. BERGUIDO, ROBERT G. ROWE AND WARREN H. WOODRING, EXECUTORS OF THE ESTATE OF CARLOS BERGUIDO, JR., AND JUNE BERGUIDO, JOY BERGUIDO, JILL BERGUIDO AND CARLOS BERGUIDO, 3D, BY THEIR GUARDIAN MARION J. BERGUIDO,

Appellants

v.

EASTERN AIR LINES, INCORPORATED

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued September 16, 1965

Before BIGGS, *Chief Judge,* and KALODNER and FORMAN, *Circuit Judges.*

OPINION OF THE COURT

(Filed November 23, 1966)

By FORMAN, *Circuit Judge.*

This is the second appeal to reach us in the wrongful death action brought in the United States District Court for the Eastern District of Pennsylvania, individually, as guardian and as executors of the estate of the deceased,

Carlos Berguido, Jr. [hereinafter referred to as plaintiff, plaintiff-appellant, and appellant], against Eastern Air Lines [hereinafter referred to as defendant, defendant-appellee, and appellee]. Decedent was a passenger for hire on a constellation that crashed near Imeson Airport, Jacksonville, Florida in the early morning of December 21, 1955.

Following two mistrials, a third trial, before a jury, resulted in a verdict for plaintiff. The jury found that the crash was the result of one or more acts of wilful misconduct on the part of the defendant. Defendant's attempt to limit its liability to $8300 under the Warsaw Convention [1] governing international airplane flights was thus defeated.[2] We reversed on evidentiary grounds.[3]

A fourth trial, before a jury, produced a verdict for plaintiff, but only for the limited Warsaw Convention liability of $8300, this jury resolving the issue of wilful misconduct adversely to the plaintiff. However, upon plaintiff's motion, the District Court vacated its judgment and granted a new trial.[4] Defendant applied to this court for a writ of mandamus and prohibition, arguing that the District Court had exceeded its power in granting the new trial. We denied the writ [5] as well as a petition for reargument.[6]

---

1 Article 22(1) of the Convention for the Unification of Certain Rules Relating to International Tranportation by Air (Warsaw Convention), 49 Stat. 3014, 3019 (1936) states:

"In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. . . ."

2 Article 25(1) of the Warsaw Convention, 49 Stat. 3014, 3020 (1936) provides:

"The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct."

3 Berguido v. Eastern Air Lines, 317 F.2d 628, *rehearing denied*, 317 F.2d 633 (3 Cir.), *cert. denied*, 375 U.S. 895 (1963).

4 Berguido v. Eastern Air Lines, Inc., 35 F.R.D. 200 (E.D. Pa. 1964).

5 Eastern Air Lines Inc. v. Clary, No. 14940, 3 Cir., June 18, 1964.

6 Eastern Air Lines, Inc. v. Clary, No. 14940, 3 Cir., July 10, 1964.

The case was then scheduled for its fifth trial. The posture of the case was as it was at the previous trials. Defendant, having pleaded the Warsaw Convention, was attempting to limit its liability to $8300,[7] while plaintiff's main efforts were directed at proving either that the decedent's flight was not international, or that defendant was guilty of wilful misconduct so as to otherwise eliminate the Warsaw Convention defense. The plaintiff had presented alternate theories of defendant's wilful misconduct. It was urged by plaintiff that the pilot of the Eastern constellation had attempted a "sneak-in" landing—dropping down through a low cloud ceiling into a position below the authorized Instrument Landing System (ILS) approach minimum elevation. This theory was developed by plaintiff through the presentation of hypothetical questions to experts, Glickstein, Kepner and Cann. Plaintiff's alternative theory was that both the pilot and the co-pilot operating the aircraft had submarginal heart conditions. Medical records were introduced in support of this theory.

Plaintiff alleges that it also urged that defendant had not met its obligations under Article 3(1) of the convention [8] and, thus, the Convention did not apply. Plaintiff

7 Defendant conceded that it could not sustain its burden of proof under Article 20(1) of the Warsaw Convention which states:

"The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures." 49 Stat. 3014, 3019 (1936).

8 Plaintiff contends that Article 3(1) of the Convention, 49 Stat. 3014, 3015 (1936) enumerates the conditions precedent to the applicability of the Convention and that the failure of the defendant carrier to so comply both removes the Convention as a defense and places the burden on plaintiff merely of proving negligence. Article 3(1) provides:

"(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

"(a) The place and date of issue;

"(b) The place of departure and of destination;

"(c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;

"(d) The name and address of the carrier or carriers;

"(e) A statement that the transportation is subject to the rules relating to liability established by this convention."

appears to indicate that the District Court was thus urged in the alternative to try the case on the theory of simple negligence.

The parties waived trial by jury. They also agreed that the District Court need not enter findings of fact and conclusions of law, which are *required* by Federal Rule of Civil Procedure 52(1) in non-jury cases. The parties further specified that the District Court might limit its decision to a general finding either for or against liability and in a single total sum fixing damages, just as a jury would do. Despite the acquiescence by the parties to a short form of disposition, not authorized by the Federal Rules, the District Court did file an opinion[9] in which it set forth findings of fact on certain aspects of its ruling.

Summarily determining the international nature of the flight, a finding which the plaintiff does not now contest, the bulk of the District Court's opinion is devoted to a discussion of whether the defendant was guilty of wilful misconduct. A discussion of whether defendant complied with Article 3(1) of the Warsaw Convention is absent, although the Convention was determined to be applicable. The District Court observed that this was a case where the evidence of wilful misconduct was meager and incomplete, making the search for truth a most difficult task. It stated that a considerable number and variety of causes of the accident were within the realm of possibility. The District Court observed further that in a case such as this, where the search is for the cause of the accident, the judgment of a court must be determined upon the probabilities insofar as they can be determined from the evidence, and not on a

8 (continued)
Article 3(2) provides further, however, that:

"The absence, irregularity, or loss of the passenger ticket shall not affect the existence of the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability."

9 Berguido v. Eastern Air Lines, Inc., Civil No. 21836, E.D. Pa., Sept. 30, 1964.

mere possibility, even if such possibility be disclosed by the evidence.

The above preliminary observations were followed by a statement of "firm findings" which the District Court apparently considered facts found "specially" conforming to the requirement of Federal Rule of Civil Procedure 52(1). The District Court found that there was not a preponderance of credible evidence that a health condition constituted wilful misconduct *causing or contributing to* the the crash of the constellation. As to the "sneak-in" theory, the District Court stated that it could not find as proven by the preponderance of the evidence all of the assumed facts stated in the hypothetical questions put to plaintiff's experts. But, even if all the assumed facts were taken to be proven, said the District Court, the conclusions reached by plaintiff's experts were not believable. Rather, the District Court chose to find that there was a substantial and reasonable probability that the presence of jet aircraft in or near the ILS glide slope for the Eastern constellation interfered with the aircraft, bringing about emergency conditions resulting in the accident, the theory of the defendant. The Court then concluded that defendant was guilty neither of wilful misconduct nor of negligence. Having previously found the Warsaw Convention applicable, judgment was entered against the defendant for $8300. Though finding against defendant's liability above $8300, the District Court indicated, albeit quite unnecessarily, that plaintiff had suffered $375,000 in damages.

—I—

Prior to examining plaintiff-appellant's position on this appeal, a question of some moment is whether the District Court complied with Federal Rule of Civil Procedure 52(1). The agreement between the parties, that the District Court need not enter findings of fact, is not effective. The requirement of Rule 52(1) is mandatory, the findings in

part serving as a necessary aid to the appellate courts.[10] If a full understanding of the factual issues cannot be gleaned from the District Court's opinion, we would be obliged to remand for compliance with Rule 52(1).

Were the findings, as prepared, sufficient compliance with Rule 52(1)? Concerning plaintiff's theory of the submarginal heart conditions of the pilot and co-pilot, the single finding that there was no probable causal relationship shown between their heart conditions and the accident is ample to meet the requirement of Rule 52(1). The basis of the Court's ruling is clear and an examination of the record will reveal whether there is substantial support for it.

The District Court did not, however, comply with Rule 52(1) when it found, without further elaboration, that some of the assumed facts stated in the hypotheticals were not proven. But for the Court's further assuming the validity of all the facts in the hypotheticals for purposes of testing whether the defendant, even under those circumstances, was guilty of wilful misconduct, the failure to elaborate on the inadequacy of the hypotheticals would have been a fatal defect requiring a remand. The Court did find, however, that assuming the accuracy of the facts in the hypotheticals, plaintiff's expert witnesses, Glickstein, Kepner and Cann, drew a conclusion therefrom as to the probable cause of the accident that was not believable. Considerable effort was exercised by the Court in analyzing the basis for the refusal to accept their conclusion. Such elaboration qualifies the finding as sufficient under Rule 52(1), if indeed a specific finding by the trier of fact is needed when the issue is one of credibility.

As to the District Court's finding that jet aircraft in or near the ILS glide slope interfered with the Eastern constellation and, therefore, defendant was not guilty of wilful misconduct, this states a fact susceptible of examina-

10 5 Moore, Federal Practice § 52.06[1], at 2653 (2d ed. 1951).

tion by an appellate court and thus is in compliance with Rule 52(1).

As an initial matter we conclude, therefore, that the requirements of Rule 52(1) have been sufficiently met.[11] The findings of fact and conclusions of law may now be considered in the light of plaintiff-appellant's appeal contentions.

—II—

Appellant now concedes the international nature of the flight and to this extent the applicability of the Warsaw Convention. It is contended for the first time, however, that the litigants to this suit, as well as most courts which have previously dealt with the question of liability under the Warsaw Convention, have labored under a misconception concerning the scheme of the Convention. Appellant urges a theory of unlimited absolute liability in the face of the appellee's alleged failure to comply with Article 3(1) of the Convention. It is argued that Article 17 [12] provides for unlimited absolute liability unless a *carrier* proves that it has complied with Article 3(1). Appellee, urges appellant, having failed to carry its burden of proof is, as a matter of law, liable without fault for the total amount of appellant's damages, under Article 17 of the Convention. Specifically, appellant contends that appellee has failed to prove both actual delivery of the ticket to the decedent and actual delivery of an *adequate* ticket showing (1) all agreed stopping places and (2) the provisions of the Convention

11 The failure of the District Court to discuss the issue of defendant's complying with Article 3(1) of the Warsaw Convention, *supra* note 8, seems to be due to its understanding of the pre-trial limitation of the issues. This problem will be discussed and disposed of below in a different context, however, and need not further clutter the issue of the Court's compliance with Rule 52(1).

12 Article 17, 49 Stat. 3014, 3018 (1936) reads:

"The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

which limit a carrier's liability. Although appellant's contention is that the burden of proof is on the carrier, an attempt is also made by appellant to affirmatively show the inadequacy of the ticket, although not the failure to actually deliver that ticket. However, failing acceptance of this approach, appellant urges that the District Court's finding of no wilful misconduct by the appellee was clearly erroneous.

Appellee contends that the issue of compliance with Article 3(1) of the Convention was eliminated from the case at pre-trial and that, nevertheless, a plaintiff, and not a carrier-defendant, has the burden of proving non-compliance with Article 3(1). Actual non-delivery of the ticket under Article 3(2) is also urged as the only Article 3(1) conduct of a carrier which will defeat the Convention as a defense. As to the question of wilful misconduct, appellee urges that there was substantial basis for the District Court's exonerating it therefrom. Appellee furthermore cross-assigns as error the District Court's grant of the motion for a new trial subsequent to the jury verdict in its favor at the fourth trial, which resulted in the fifth trial from which this appeal has been taken.

The contentions thus having been outlined, we now turn to their disposition.

—III—

Appellant has urged that both *Grey v. American Airlines*[13] and *Westminster Bank v. Imp. Airways, Ltd.*[14] stand for the proposition that liability under Article 17 of the Warsaw Convention, as an initial matter, is absolute and unlimited. To avoid such liability a carrier must demonstrate compliance with Article 3(1) of the Convention, argues appellant. Neither case supports the proposition, for the question of whether Article 17 provides such *unlimited* absolute liability for the death of a passenger was not an issue therein. Furthermore, in the first appeal before this court, Judge McLaughlin, though not faced

13 227 F.2d 282 (2 Cir. 1955).
14 2 All E. R. 890 (K.B. 1936).

squarely with the issue as here raised, in effect disposed of it by appropriately reading Articles 17 and 22(1)[15] in pari materia. It was thus stated:

> ". . . The Warsaw Convention provides, inter alia, that the carrier is absolutely liable for all injuries where the accident causing the damage so sustained took place on board the aircraft. Article 17. In such circumstances the liability of the carrier for each passenger is limited to 125,000 francs (approximately $8300). Article 22(1) . . . ."[16]

Article 17 itself gives no indication of the extent of a carrier's liability. It must be read with Article 22(1) for the question concerning the extent of the liability to be answered, and an analysis of the question does not support absolute *unlimited* liability as the scheme of the Convention.

Having thus disposed of this contention, appellant must sustain either (1) its argument that the District Court erroneously found that the appellee was free from wilful misconduct or (2) its argument that there had not been compliance with Article 3(1) of the Convention. Success of the latter argument would have removed the Convention defense of limited liability and allowed the suit to proceed to trial, with the plaintiff's burden being merely to prove the negligence of the defendant, rather than wilful misconduct, this approach being the appropriate substitute for appellant's urged absolute and unlimited liability without fault theory.

Such contention, revolving around a construction of Article 3(1), raises the more specific issues of (a) which party has the burden of proof to show compliance or a failure thereof, (b) whether the issue as framed by appellant was eliminated at pre-trial, (c) whether the record

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15. *Supra* note 1.

16 Berguido v. Eastern Air Lines, *supra* note 3 at 629. (Emphasis added.)

before us is sufficient to allow us to dispose of the merits of the mixed questions, and (d) if the record is ample, whether appellee has complied with Article 3(1) and what are the legal ramifications if it has not done so.[17]

Appellant submits that its position relative to Article 3(1) must be sustained, that it proved negligence, and that, therefore, this court should remand for entry of judgment in the amount of $375,000 as found by the District Court. The District Court, however, as well as finding that appellee was not guilty of wilful misconduct, found that appellee was not even negligent. If this conclusion is supportable, it is final and there is no need for us to examine appellant's legal contentions concerning Article 3(1) of the Convention, which we have set forth in the foregoing paragraph, for even if those contentions are determined in favor of appellant, they would not dictate a reversal.

The issues of appellee's wilful misconduct and negligence are bound together in this case, for appellant's theories of the cause of the accident would have been the basis for proving both, and the burden of such proof as to both remained with appellant as plaintiff.[18]

As to appellee's theory that jets entered the ILS glide slope of the Eastern constellation, and the District Court's acceptance of it as the probable cause of the accident, it appears that the evidence supporting it is exceedingly thin. It is unnecessary in this instance to finally resolve whether such a finding is supported by substantial evidence in the record for, even absent such a finding, we are

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17 For discussions of the legal consequences of a failure to comply see Mertens v. Flying Tiger Line, Inc., 341 F.2d 851 (2 Cir. 1965); Grey v. American Airlines, *supra* note 13 at 284, *affirming* 95 F. Supp. 756 (S.D.N.Y. 1950); Lisi v. Alitalia-Linee Aeree Italiane, 253 F. Supp. 237 (S.D.N.Y. 1966).

It is in passing noteworthy that in *Mertens* the plaintiff had assumed that the burden was upon him to prove defendant's failure to comply with Article 3(1).

18 Grey v. American Airlines, *supra* note 13 at 285-86.

satisfied that the record supports the District Court's conclusion that appellant failed to prove conduct of the appellee that was either wilful or negligent, and the proximate cause of the accident. Such independent proof would have been essential to appellant's recovery.

Though medical deficiencies of the pilot and co-pilot were demonstrated, the District Court chose not to draw an inference from this fact that a triggering of known physical disabilities was the cause of the air mishap. It had the right as the trier of fact to refuse to draw such an inference. As there was no other evidence introduced to show either a physical malfunction of the pilot or co-pilot or that such a malfunction was the probable cause of the accident, the District Court's finding that this theory could not be sustained as the probable cause of the accident is not clearly erroneous.

Appellant's alternative theory that the pilot knowingly attempted an illegal "sneak-in" below the cloud ceiling in violation of minimal altitude requirements rested solely on the answers to hypothetical questions put to three expert witnesses by appellant. Appellant's experts' answers to the hypotheticals all concluded that the pilot must have been attempting the theorized illegal "sneak-in". Appellee's experts testified that it was not possible to draw such a conclusion from the hypothetical facts. The District Court chose not to believe appellant's experts. Its impression of appellant's experts as stating overly partisan, highly speculative, and unqualified opinions was a permissible determination of credibility by the fact finder. Thus, as the testimony of the expert witnesses was the only basis for appellant's "sneak-in" theory, the District Court's refusal to believe it, particularly in the light of contrary expertise, was well within its province as fact finder.

The initial observation of the District Court that the evidence as to causation was meager and incomplete would appear to have substantial support in the record. Its con-

clusion that the evidence was not sufficient for the appellant, as plaintiff, to have sustained the requisite burden of proof on the question of appellee's wilful misconduct or negligence was not clearly erroneous. The resolution of this issue which is fundamental to the litigation, against appellant, precludes the necessity for our determining the numerous subsidiary issues it has raised, as noted heretofore.[19]

The District Court entered judgment in favor of appellant, but for the limited Convention liability of $8300. Appellee did not contest this entry of judgment. Indeed, it tendered the $8300 prior to judgment and has taken no cross-appeal. The judgment of the United States District Court for the Eastern District of Pennsylvania of September 30, 1964 will, therefore, be affirmed.

BIGGS, *Chief Judge*, concurring.

I concur in the result reached by Judge Forman and in all that he has said save for one statement. His opinion states: "As to appellee's theory that jets entered the ILS glide slope of the Eastern constellation, and the District Court's acceptance of it as the probable cause of the accident, it appears that the evidence supporting it is exceedingly thin." I shall not discuss the evidence that formed the basis for the District Court's acceptance of the theory that jets entered the ILS glide slope of the Eastern constellation since it is not relevant to the decision of this case, but I cannot agree with Judge Forman's statement that the evidence supporting such a theory is "exceedingly thin".

19 This disposition also makes it unnecessary to consider appellee's cross-assignment of error concerning the District Court's grant of appellant's new trial motion subsequent to the fourth trial and the jury verdict in appellee's favor.

KALODNER, *Circuit Judge*, dissenting.

I would reverse the Judgment of the trial court and remand with directions to grant a new trial for these reasons:

1. Inconsistent fact-findings were made by the trial court on the score of the defendant's negligence; it expressly found that the plane crash was due to a sudden emergency created by "the highly probable presence and actions of jet aircraft" and that as a consequence the defendant was free of all fault or negligence, and then, in awarding $8300 damages to the plaintiffs, it implicitly found that the defendant was negligent since such an award could only have been made under the Warsaw Convention on a finding of negligence. It is settled that where fact-findings are inconsistent either with one another, or with the verdict, that a new trial must be granted. Freightways, Inc. v. Stafford, 217 F.2d 831, 835 (8 Cir. 1955); Rule 49(b) Federal Rules of Civil Procedure.

2. The trial court's fact-finding that the crashing of the plane was due to a sudden emergency created by "the highly probable presence and actions of jet aircraft" was against the overwhelming weight of the evidence; it could not have been reasonably made under the evidence.

3. The stated fact-finding as to the "probable" presence of jets was clearly on its face speculative. It is settled that "mere speculation" cannot "be allowed to do duty for probative facts." Galloway v. United States, 319 U.S. 372, 395 (1943); Noel v. United Aircraft Corporation, 342 F.2d 232, 239 (3 Cir. 1965).

4. The trial court erred as a matter of law in ruling that the explicit testimony of plaintiffs' witnesses—airport control tower operators and naval and air force officers—that jets were *not* present at the time of the crash, was *negative* proof which "did not balance or outweigh the

affirmative testimony" of the defendant's witnesses that they saw and heard jets. It is settled that where a witness is so circumstanced that he is able to testify as to non-presence of a thing, his testimony is *affirmative:* Eiseman v. Pennsylvania R. Co., 151 F.2d 222 (3 Cir. 1945); Enfield v. Stout, 400 Pa. 6 (1960); Wigmore on Evidence, (3rd ed.) 777 § 664.

5. The trial court's expressed admission that "The actual cause of the crash of Flight 642 cannot be determined on the record before me" evidenced a "hung-jury" situation which required it to abstain from reaching a verdict and to direct a new trial. Where a jury cannot reach a verdict as to how an accident happened it is a "hung-jury". The trial court, to which the case was tried without a jury, was a "jury". Allen v. St. Louis Bank, 120 U.S. 20, 30 (1887).

The majority has not adverted to any of the stated points nor does its opinion indicate an awareness of their existence.

It has confined its consideration to the single point as to whether the record supports the trial court's finding that the defendant *"was not even negligent"*, and has found on that score that "the record supports the District Court's conclusion that *appellant* [plaintiffs] *failed to prove conduct of the appellee* [defendant] *that was either wilful or negligent*, and the proximate cause of the accident", and *"Such independent proof* would have been essential to appellant's recovery". (emphasis supplied)

The majority has by-passed resolution of the critical question as to whether the evidence supports the trial court's finding that the accident was caused by a sudden emergency due to the "probable presence and actions of jet aircraft", even though it concedes that the evidence as to the presence of jets "is exceedingly thin", for the assigned reason that the plaintiffs failed to meet their burden to prove even negligence.

The majority errs in its view that the plaintiffs bore the burden to prove negligence.

The Warsaw Convention, 49 Stat. 3,000 et seq., provides in Article 17 [1] that where a passenger is killed or injured aboard a plane "the carrier shall be liable for damage sustained", and Article 20(1) [2] imposes the burden of the carrier to prove that it has "taken all necessary measures to avoid the damage or that it was impossible" for it to take them. We specifically noted these provisions when the instant case was before us on a prior appeal. Berguido v. Eastern Air Lines, Incorporated, 317 F.2d 628, 629 (1963).[3] It is undisputed that Article 17 "creates a *presumption* of liability from the happening of the accident." [4] The late Secretary of State Hull, in a letter dated

1 Article 17 of the Warsaw Convention provides as follows:

"The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident causing the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

2 Article 20(1) of the Convention provides:

"The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures."

3 In Berguido v. Eastern Air Lines, Incorporated, 317 F.2d 628 (3 Cir. 1963), Judge McLaughlin, speaking for this Court, said at page 629:

"The Warsaw Convention provides, inter alia, that the carrier is absolutely liable for all injuries where the accident causing the damage so sustained takes place on board the aircraft. Article 17. In such circumstances the liability of the carrier for each passenger is limited to 125,000 francs (approximately $8,300). Article 22(1). In order to escape that liability, the carrier has the burden of proving that it has taken all necessary measures to avoid the damage or that it was impossible for it to take them. Article 20(1). On the other hand, if the plaintiff sustains his burden of proving that the damage is caused by the 'wilful misconduct' of the carrier, '[t]he carrier shall not be entitled to avail himself of the provisions of this convention which exclude [Art. 20(1)] or limit [22(1)] his liability.' Article 25(1)."

4 In Komolos v. Compagnie National Air France, 111 F. Supp. 393, 401 (S.D.N.Y. 1952), rev'd on other grounds, 209 F.2d 436 (2 Cir. 1953), cert. den. 348 U.S. 820 (1954), the court stated: "The Convention creates a *presumption* of liability from the happening of the accident. Art. 17. It gives the carrier complete exoneration from liability if the carrier can prove that it took all necessary measures to avoid the damage." See also Wyman v. Pan American Airways, Inc., 43 N.Y.S.2d 420, 422 (1943); Ritts v. American Overseas Airlines, Inc., 1949 U.S. Av. 65 (S.D.N.Y. 1949).

March 31, 1934, addressed to the President, recommending adherence to the Convention, pointed out that Article 17 of the Convention creates a presumption of negligence against the carrier.[5]

The majority errs in the further respect that in holding that "the record *supports the District Court's conclusion that appellant failed to prove conduct of the appellee that was either wilful or negligent*", it disregards the hard fact that the trial court *did find the defendant negligent* when it returned a verdict of $8300 against the defendant. As earlier stated, such an award could only be made under the Warsaw Convention when a carrier is negligent.

The fact of the matter is that the defendant has not on this appeal challenged the finding of negligence implicit in the $8300 award; to the contrary, it seeks affirmance of that award.

Moreover, the defendant stresses in its brief that the issue of negligence was not even at issue at the trial; that the only issues were the defendant's wilful misconduct and the applicability of the liability limitations of the Warsaw Convention.

What has been said brings us to the consideration of the trial court's fact-findings that the "*presence and action of jet aircraft*" during the plane's landing maneuvers "threatened or interfered with the approach of Flight 642, *bringing about emergency conditions and accident resulting in the crash without willful misconduct, negligence or fault on the part of the defendant* or any member of the crew of Flight 642"; and that the plane's crew had not "under other than emergency conditions knowingly and intentionally brought the plane to a position below the minimums prescribed for an ILS approach."

Discussion of the evidence relating to the presence or action of jets must be prefaced by a brief statement of the

5 Secretary Hull said: "The effect of Article 17 (ch. III) of the Convention is *to create a presumption of liability against the aerial carrier on the mere happening of an accident* occasioning injury or death of a passenger subject to certain defenses allowed under the Convention to the aerial carrier. 1934 U.S. Av. 240, 243." (emphasis supplied)

plaintiffs' contentions with respect to the crashing of the plane, and the scope of our review of the trial court's fact-finding that jets created a sudden emergency.

First as to the plaintiffs' contentions:

One of the two[6] alternative theories presented below by the plaintiffs as to the issue of defendant's wilful misconduct, was that the plane crashed while it was attempting a "sneak-in" landing, viz., dropping down through a low cloud ceiling into a position below the authorized Instrument Landing System (ILS) approach minimum in violation of Civil Air Regulations. The majority concedes that such a "sneak-in" maneuver would constitute not only negligence but wilful misconduct as well and I agree.

Second, as to the scope of our review as to the trial court's fact-findings with respect to jets:

The defendant's evidence as to the presence of jets was presented below on depositions. The defendant's evidence as to the nonpresence of jets was also presented on depositions, with but one exception. It is settled that under such circumstances this Court can review and evaluate a finding based on deposition testimony free of the impact of the "clearly erroneous" rule. Mobil Tankers Company, S. A. and Socony Oil Company, Inc. v. Mene Grande Oil Company, 363 F.2d 611, 613 (3 Cir. 1966)[7] and the cases therein cited.

Coming now to the testimony as to the presence or nonpresence of jets which must be considered in the light of the undisputed fact that the only jets in existence at

6 The other alternative theory was that both the pilot and co-pilot had submarginal heart conditions which caused or contributed to the plane's crashing. I agree with the majority's view that the trial court's rejection of this theory cannot be said to be "clearly erroneous".

7 We there said "Meneg argues that the lower court's findings of fact are presumptively correct and our right to review them is circumscribed by the 'clearly erroneous' rule. This rule is inapplicable in the instant case. Since the matter was presented to the lower court on affidavits without oral testimony the findings of fact are reviewable free of the impact of the rule. . . . We are in as good a position as was the trial court to evaluate the evidence, draw the inferences of which the evidence is reasonably susceptible, and decide the critical questions raised on this appeal". 363 F.2d 613.

the time of the plane crash here involved were naval and military jets:

The defendant's testimony as to the presence of jets was adduced in the depositions of three witnesses.

Donald Wheeler said in his deposition that he saw "a silhouette of what looked to be two jets" and heard the sound of jets while he was driving his truck near the Airport at the time of the crash; he walked over to the burning plane but did not report his "observation to anyone at the scene of the accident"; he, however, told his father-in-law, an employee of the defendant, about it the next day.

Mrs. Marian A. Farrish said in her deposition that she lived a 20-minute drive from the crash; she heard but did not see a commercial aircraft and jets; she could not explain why in her earlier testimony before the Civil Aeronautics Board she had testified that she heard only jets and not any other type plane.

Mrs. Fred Lubin said in her deposition that she lived two miles from the Airport; *she heard but did not see* both a passenger plane and a "jet or jets" just before the accident.

The plaintiffs' testimony as to the jet issue was as follows:

Rear Admiral John Francis Greenslade testified in his deposition that in January 1956 he was a Captain of the United States Navy, and Director of Flight Service Division in the Office of Chief of Naval Operations; at the request of the Chief of the Investigation Division of the Civil Aeronautics Board he made a check to ascertain whether there were any Navy jets aloft in the vicinty of Jacksonville, Florida between 12 A.M. and 6 A.M. December 21, 1955 (the crash occurred at 3:41 A.M. December 21, 1955); he made the check requested and found that at the specified period no naval jets were in operation in the area of Jacksonville.

Major Robert J. Tobin of the United States Air Force testified in his deposition that in January 1956 he made

a check at the request of the Inspector General and the Civil Aeronautics Board as to whether there were any military jets aloft in the vicinity of Jacksonville at the time of the crash and ascertained that there were neither military nor naval jets.

William T. McKinney, employed by the Civil Aeronautics Board as airways operations specialist (tower operator) in the control tower of the Jacksonville Airport, testified in his deposition that he was on duty between midnight and 8 A.M. December 21, 1955, together with Lawrence B. Robison, a control tower operator; he saw no jets or aircraft other than the doomed plane on his radar scope.

Robison in his deposition testified to the same effect; moreover, that he neither saw nor heard any jet or aircraft other than the defendant's plane, prior to or at the time of the crash.

Carl Alton Anderson, a Jacksonville policeman, testified in his deposition that he was on duty at the Airport at the time of the crash and that he did not "hear a jet aircraft that night".

Franklin Cardwell, a National Airlines flight engineer, with some 20 years experience, gave this oral testimony at the trial: he lived across the street from defendant's witness Farrish: he heard one Constellation plane (defendant's plane was a Constellation), and it was the only plane aloft at the time; he was familiar with the sound of jet engines; he did not hear a jet and had there been a jet in the air he would have heard since he was listening; he had testified to that effect at the CAB hearing.

The trial court credited the testimony of the defendant's witnesses as to the presence of jets. In doing so it said:

"To me, *affirmative testimony* as to seeing objects and hearing sounds, when unequivocal, reasonable and ringing true to the trier of fact is far more persuasive than testimony that said sights or sounds were not seen

or heard by other witnesses having opportunity and occasion to see and hear.

"On this subject, the *negative testimony in this case,* whether taken singly or as a whole, in my mind *does not balance or outweigh the affirmative testimony.* The testimony of Greenslade and others to the effect that no military jets were reported or recorded as operating in the Jacksonville area at the time, while given full consideration, does not convince me that jet aircraft were not or could not have been seen and heard at the time and place indicated in the testimony of Wheeler, Lubin and Farrish." (emphasis supplied)

It is obvious that the trial court cleared the decks, so to say, for its crediting of the testimony of the defendant's witnesses by its erroneous categorization of their testimony as *affirmative* and the countervailing testimony of the plaintiffs' witnesses as *negative.*

As earlier stated, the trial court erred as a matter of law in categorizing the testimony of the plaintiffs' witnesses as "negative". Also, as already said, the trial court's fact-findings as to the presence of jets was against the overwhelming weight of the evidence of competent and disinterested witnesses and they could not have been reasonably made by a fact-finder.

The defendant in its brief[8] candidly admits that the evidence did not "conclusively" prove that the accident was caused by "interference from jet aircraft"; that "no one has yet proved why" the plane crashed; that the cause of the crash was an "unpenetrable mystery"; and that "After Judge Boldt sat through 1200 pages of testimony, read 27 depositions, and examined over 50 exhibits, he decided *'The actual cause of the crash of Flight 642 cannot be determined on the record before me. . . .'*"[9]

The defendant's position here presents a baffling anomaly in another respect, viz., it seeks an affirmance of

8 Pages 15 and 16, Appellee's Brief.

9 Para. 4 of the trial court's "firm findings and conclusions".

the trial court's award of $8300 with its implicit fact-finding that the defendant was negligent, in patent disregard of the circumstance that the trial court's fact-findings that jets created a sudden emergency which caused the plane crash "without willful misconduct, negligence or fault on the part of the defendant", made it mandatory for the trial court to render a verdict in favor of the defendant under Article 20 of the Warsaw Convention,[10] which absolves a carrier from all liability where a sudden emergency causes an accident.

The majority's disposition reflects the same anomaly in that it affirms a judgment based on a finding that a sudden emergency caused the plane crash without wilful misconduct or negligence on the part of the defendant which required rendition of a verdict for the defendant, and at the same time it inconsistently affirms a judgment which awards the plaintiffs $8300 for negligence.

In summary, I would reverse the Judgment of the trial court and remand for a new trial because of the inconsistency of fact-findings and verdict; the speculative and clearly erroneous fact-findings as to the jets; the erroneous legal standard applied by the trial court with respect to *affirmative* and *negative* evidence, and last, but not least the inescapable fact that this was a "hung-jury" requiring abstention from reaching a verdict and granting of a new trial, inasmuch as the trial judge expressly concluded that "The actual cause of the crash of Flight 642 cannot be determined on the record before me".

This must be added.

The plaintiffs here contend that the liability limitations of $8,300, absent wilful misconduct, of Article 22(1) of the Convention are inapplicable under Article 3(2) because the defendant failed to deliver a passenger ticket to their decedent which adequately advised him of the limitation of liability provision as required by Article 3(1)(e). Under the cited provisions of Article 3 ". . . the carrier must deliver a passenger ticket which shall contain . . . a state-

10 See Note 2.

ment that the transportation is subject to the rules relating to liability established by this convention."

The majority did not dispose of this contention for the assigned reason that it finds, albeit erroneously, that plaintiffs had failed to meet their burden to prove even negligence on the defendant's part.

While I, too, do not reach this contention, because of my opinion that a new trial must be granted for the reasons earlier stated, I nevertheless feel constrained to express a view as to it should a new trial be granted, as it should.

In the instant case, the passenger ticket, in a footnote on its face [11] stated:

> "Carriage/Transportation under this Passenger Ticket and Baggage Check, hereinafter called 'ticket', is subject to the rules relating to liability established by the Convention for the Unification of Certain Rules Relating to International Carriage/Transportation by Air signed at Warsaw October 12, 1929, if such carriage/transportation is 'international carriage/transportation' as defined by said Convention."

In a recent case, a similar footnote on a plane passenger ticket was held not to be in compliance with the requirement of the notice provisions of Article 3(1)(e) of the Convention, Lisi v. Alitalia-Linee Aeree Italiane, 253 F. Supp. 237 (S.D.N.Y. 1966).

It was there said at page 243:

> "The footnotes printed in miscroscopic type at the bottom of the outside front cover and coupons, as well as condition 2(a) camouflaged in Lilliputian print in a thicket of 'Conditions of Contract' crowded on page 4, are both unnoticeable and unreadable. Indeed, the exculpatory statements on which defendant relies are virtually invisible. They are ineffectively positioned, diminutively sized, and unemphasized by bold face type, contrasting color, or anything else. The simple truth

11 Only the face of the passenger ticket was in evidence.

is that they are so artfully camouflaged that their presence is concealed.

" 'Lilliputian typography,' Eck v. United Arab Airlines, Inc., 20 App. Div. 2d 454, 457, n.2, 247 N.Y.S.2d 820, 824, rev'd on other grounds, 15 N.Y.2d 53, 255 N.Y.S.2d 249, 203 N.E.2d 640 (1964), which must be read through 'a magnifying glass,' Warren v. Flying Tiger Line, Inc., 234 F. Supp. 223, 230 (S.D. Cal. 1964), aff'd, 352 F.2d 494 (9th Cir. 1965), is at war with the intent of the Convention. This was recognized by our Court of Appeals in *Mertens* where one of the reasons for precluding the carrier from limiting its liability under the Convention was that the required statement 'was printed in such a manner as to virtually be unnoticable and unreadable * * *.' Mertens v. Flying Tiger Line, Inc., supra, 341 F.2d at 857."

I agree with the holding cited.

I would go further, and hold that assuming the footnote notice, as framed, was printed in readily discernible manner, that it would not satisfy the plain intent of the Convention that a passenger should be adequately advised by his ticket that the carrier's liability was limited by the Convention to $8,300, absent wilful misconduct on the carrier's part.

The rationale of such a holding can be briefly stated. A plane passenger is not put on notice of the $8,300 liability limitation by an abbreviated statement that his carriage "is subject to the rules relating to liability established by the Convention for the Unification of Certain Rules Relating to International Carriage/Transportation by Air signed at Warsaw October 12, 1929. . . ."

Passengers on an international flight are not expected to carry with them a copy of the Warsaw Convention. See Lachs v. Fidelity & Casualty Co. of New York, 306 N.Y. 357 (1954), 118 N.E.2d 555 where it was said of a contract of flight insurance:

"We all know that a contract of insurance, drawn by the insurer, must be read through the eyes of the average man on the street or the average housewife who purchases it. Neither of them is expected to carry the Civil Aeronautics Act or the Code of Federal Regulations when taking a plane". 118 N.E.2d 558.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.